80-747

Supreme Court, U. S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

ELVA JEAN ANDERSON

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF MICHIGAN

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QUESTION PRESENTED

DID THE MICHIGAN SUPREME COURT FUNDAMENTALLY MISAPPLY THE FEDERAL LAW OF DOUBLE JEOPARDY IN HOLDING THAT THE FIFTH AMENDMENT BARRED RETRIAL ON THE ORIGINALLY CHARGED OFFENSE OF FIRST DEGREE MURDER WHERE THE RECORD SHOWS THAT THE TRIAL COURT USED THE EVIDENCE ADDUCED AT TRIAL FOR THE PURPOSE OF RECONSIDERING AND GRANTING IN MID-TRIAL DEFENDANT'S PREVIOUSLY MADE PRETRIAL MOTION TO QUASH THE MURDER CHARGES - - ON LEGAL GROUNDS, NOT TO MAKE A FACTUAL RESOLUTION OF DEFENDANT'S GUILT OR INNOCENCE - - AND WHERE DEFENDANT READILY CONSENTED TO THE TERMINATION OF HER JURY TRIAL?

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on August 28, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at 409 Mich 474; _____ NW2d _____ (1980), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 9, 1977. The judgment of the Michigan Supreme Court, reversing the Michigan Court of Appeals, was entered on August 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Defendant Elva Jean Anderson was charged with first degree premeditated murder.

The court denied defendant's pretrial motion to quash on August 11, 1975, issuing a written opinion[1] that there was sufficient evidence shown at the preliminary examination to bind defendant over for trial on the charge of first degree premeditated murder. The trial began on October 7, 1975 and continued on October 8th. On the morning of October 9, 1975 the court heard and granted defendant's motion for personal bond stating, "The Court feels that if it had had all the information it has now at the beginning of this case, the defendant would never have been remanded." (Bond T. 3-4)[2] Thereupon, defense counsel stated defendant wished to offer a plea to manslaughter (Bond T. 4). An off-the-record conversation followed (Bond T. 4). The court proceeded to take defendant's plea to manslaughter over the prosecution's objection that it had not made any plea offer in this case (Plea T. 3)[3]. After the court accepted defendant's plea of guilty to manslaughter, it dismissed the crime charged in the information of first degree, premeditated murder as well as the necessarily lesser-included offense of second degree murder. (Plea T. 15-16, 23-27, 30).

The court stated that what it was doing was reconsidering and granting defendant's previously made motion to quash (Plea T. 16, 24, 26-27, 30). The prosecution informed the defendant and the court it intended to appeal the trial court's ruling and retry defendant on the original charge (Plea T. 28-29).

---

1 Appendix "C"
2 Appendix "D"
3 Appendix "E"

The prosecution appealed to the Michigan Court of Appeals because under Michigan law a motion to quash the information may be granted and a plea to a lesser-included offense taken only where the magistrate abused his discretion in binding a defendant over for trial. See Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974).

The Michigan Court of Appeals (Appendix "A") held that the trial judge in the instant case acted improperly in accepting defendant's plea to manslaughter and that she could be retried for first degree murder. The Michigan Supreme Court (Appendix "B") agreed that the trial judge's actions appeared to be violative of Michigan law, but held that the Fifth Amendment double jeopardy clause barred retrial on the charge of first degree murder.

REASONS FOR GRANTING THE WRIT

Petitioner believes that the Michigan Supreme Court, understandably confused by the multitude of recent contradictory and conflicting double jeopardy cases decided by this Court, fundamentally misapplied the law of double jeopardy in ruling that the trial court's dismissal of murder charges by granting in mid-trial - even before the prosecution rested its case - defendant's pretrial motion to quash based on testimony he heard at trial was an "acquittal" barring retrial, despite the fact that a) it was not so denominated by the trial judge, b) it may have been erroneous both procedurally and in terms of questions of law on which it was founded, and c) it came about with defendant's cooperation and consent. Because the facts of this case present a complex situation invoking the tests previously held by this Court to be despositive of double jeopardy issues, Petitioner believes this case offers this Court a unique

opportunity to resolve the dilemma presently faced by lower courts in trying to apply the conflicting rules that currently make up the state of the law of double jeopardy.

Prior to trial in the instant case defendant had made a motion to quash the murder charges on the grounds that the examining magistrate had abused his discretion in finding the elements of the crime of first degree murder were shown from the testimony presented to him. The trial court correctly denied this pretrial motion on August 11, 1975; sufficient evidence of first degree murder had been presented to the magistrate. Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115 (1974); People v Karcher, 322 Mich 158 (1948); People v Dellabonda, 265 Mich 486 (1933).

Several days into the trial (jeopardy having attached) with more prosecution witnesses yet to testify, the trial court abruptly announced he was reconsidering and granting defendant's pretrial motion to quash the murder charges. The trial judge repeatedly stated that what he was doing was granting defendant's pretrial motion to quash the information after having heard more testimony that was presented to the magistrate at the preliminary examination:

> The People have not concurred in the acceptance of a plea to manslaughter in this case and dismissal of the charges of murder in the first degree and murder in the second degree.
>
> Under some circumstances, it has been held - in the case of the Prosecutor versus Genesee County Judge - that a trial judge - that a judge in a case may not accept a plea of guilty to a reduced charge in any case without the concurrence of the Prosecutor's Office. There are some exceptions to that rule.

It has been indicated to the Judges by Supreme Court judges, informally, that if there is an abuse of discretion on the part of the Prosecutor's Office that a Judge may exercise discretion in accepting a plea. This Court does not apply that rule to this case except to the following extent:

The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree and that this court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the court had been in possession of the facts which this court had heard in this case. (Plea T. 15-16).

* * *

. . . this court grants Mr. Roth's motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree . . . (Plea T. 23-24). (Emphasis added)

* * *

THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case, the court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard. (Plea T. 24) (Emphasis added)

* * *

THE COURT: Yes - I am going to answer part of what you said - the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made prior to the commencement of the trial in this case. (Plea T. 26-27) (Emphasis added).

* * *

. . . I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the court is satisfied that the court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first degree murder in this case. (Plea T. 30) (Emphasis added)

Defendant seized the opportunity to terminate her trial by pleading guilty to the remaining lesser-included charge of manslaughter before the trial court formally dismissed the murder charges. (Plea T. 4-6).

There is no question that testimony that was adduced at trial triggered the court's decision to dismiss the murder charges. Dismissal was improper under Genesee Prosecutor v Genesee Circuit Judge, People v Karcher and People v Dellabonda, supra. However, petitioner believes that the mere fact that the trial

judge used trial testimony to dismiss charges does not resolve the issue of whether retrial is barred. One must look to what purpose he put the trial testimony; resolution of this double jeopardy issue depends on the nature of the court's action of dismissal. To determine what the court did, one must look to both the form and substance of his act.

> [A]n appeal is not barred simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," id., at 348, 43 LEd 2d 232, 95 S Ct 1013, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," Lee, supra, at 30, 53 LEd 2d 80, 97 S Ct 2141. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." United States v Scott, 437 US 82; 98 SCt 2187; 57 LEd 2d 65, 78 (1978) quoting United States v Martin Linen Supply Co., 430 US 564, SCt 1349; 51 LEd 2d 642 (1977). See also Lee v United States, 432 US 23, 30, N. 8; 97 SCt 2141; 53 LEd 2d 80 (1977).

Admittedly, a verdict of acquittal, whether based on a jury verdict or a directed verdict entered by the judge, is final even if erroneously entered. Double jeopardy principles bar retrial. Fong Foo v United States, 369 US 141, 143; 82 SCt 671; 7 LEd 2d 629 (1962); United States v Martin Linen Supply Co., 430 US 564, 97 SCt 1349, 51 LEd 2d 642 (1977); Burks v United States, 437 US 1; 98 SCt 2141; 57 LEd 2d 1 (1978); Sanabria v United States, 437 US 54; 98 SCt 2197; 57 LEd 2d 43 (1978).

On the other hand, the important factor to consider under double jeopardy analysis is for defendant to have primary control over the course to be followed where error creeps into the trial. Hence, the double jeopardy clause does not bar retrial where defendant

consents to the interruption of the trial by moving for a mistrial, absent a purposeful act of bad faith on the part of the prosecution or the trial court in order to provoke a mistrial. United States v Dinitz, 454 US 600; 96 SCt 1075; 47 LEd 2d 267 (1976). Similarly, where a defendant seeks to terminate his trial by a dismissal prior to its conclusion, before there has been any factual resolution of his guilt or innocence, retrial is not barred. His motion is "functionally indistinguishable" from a declaration of a mistrial. Defendant has made a deliberate decision to give up his right to have his guilt or innocence determined by the particular jury which has been impanelled. Lee v United States, supra at 31; United States v Scott, supra at 76.

Consequently, the key question here is whether the trial court's use of trial testimony related back to the pretrial motion to quash on legal grounds or extended forward to a directed verdict of acquittal. The former would not be a factual resolution of the defendant's guilt or innocence, the latter would. Petitioner believes that what the trial court was doing was using trial testimony to quash the murder charges - despite the fact that all the elements of the crime had been shown at the preliminary examination - because he believed that the crime of murder had not been shown where some evidence of justification or excuse came out at trial. He was therefore now quashing the information because, in light of this new testimony, he believed the prosecution abused its discretion by overcharging and the examining magistrate abused his discretion by binding defendant over for trial on the murder charge. He used the trial testimony to relate back to the pretrial motion to quash. Thus, the trial court's action was actually a dismissal on a pretrial issue (motion to quash) granted in the middle of trial after jeopardy had attached. The court's decision was a ruling on a question of law: whether the magistrate abused his discretion in finding the evidence sufficient to bind defendant over for trial on first degree murder. And, while he stated he was considering testimony presented at trial, he was not doing so to

resolve the ultimate question of defendant's guilt or innocence - because he then would have continued to hear the remainder of the People's witnesses and entertain the motion for directed verdict he indicated he expected he would have to grant. Retrial is not barred under the standard applied in United States v Scott, supra because the trial ended before there was any resolution of defendant's guilt or innocence. Moreover, defendant herself consented to the termination of her jury trial. She specifically waived her valued right to have her trial completed by a particular jury that had been empaneled to try the case, and chose not to continue with the trial. (Plea T. 4-5, 6-7). This was done over the strenuous objection of the prosecution. Defendant not only had primary control over the proceedings, she had total control to act in her "own best interests" (Plea T. 7), and the prosecution, which had no control over whether the trial would continue but wanted it to proceed, was left to repeatedly object in defendant's presence and on the record that it would appeal (Plea T. 3, 15, 25-26, 28-31).

> "This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had a least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him but because of a legal claim that the government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. United States v Scott, supra, at 77.
>
> * * * *
>
> "We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a

> basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of 'waiver' of double jeopardy rejected in [Green v United States, 355 US184, 78 S Ct 221, 2 L Ed 2d 199 (1957).] Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. In Green the question of defendant's factual guilt or innocence of murder in the first degree was actually submitted to the jury as a trier of fact; in the present case, respondent successfully avoided such a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him." (Emphasis added) United States v Scott, supra, at 79.

In summary, defendant deliberately chose to give up her right to have her guilt or innocence decided by this particular jury and consented to the termination of her murder trial when the court granted her pretrial motion to quash in the midst of trial on grounds unrelated to defendant's factual guilt or innocence. Under Dinitz, Scott and Lee, supra, retrial on the charge of first degree murder is not barred by the double jeopardy clause.

CONCLUSION

It is respectfully submitted that the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with and misconceives decisions of this Court, and is in conflict with the Fifth and Fourteenth Amendments of the United States Constitution such that prelenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ABW:pd

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APPENDIX

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APPENDIX "A"

STATE OF MICHIGAN
COURT OF APPEALS

People of the State of Michigan,
Plaintiff-Appellant

v

Docket # 26966

ELVA JEAN ANDERSON,
Defendant-Appellee

Before: Beasley, P.J., and V. J. Brennan and J. R. McDonald, JJ.
PER CURIAM

Defendant Elva Jean Anderson was charged with the offense of first-degree murder, contrary to MCLA 750.316; MSA 28.548. The trial commenced on October 6, 1975, before Recorder's Court Judge Thomas L. Poindexter. On October 9, 1975, the trial court accepted defendant's plea of guilty to the offense of manslaughter, contrary to MCLA 750.321; MSA 28.553, over the objections of the prosecuting Attorney. On November 24, 1975, defendant was sentenced to probation for a period of three years. Prosecution filed claim of appeal on January 27, 1976.

This case is straight forward. Defendant was charged with the offense of first-degree murder. Trial commenced on that charge October 6, 1975. On October 9, 1975, defendant pled to the included offense of manslaughter, contrary to MCLA 750.321; MSA 28.553. Prosecution objected to acceptance of the plea by the trial court. Prosecution still had two res gestae witnesses to present. The trial court overruled the prosecution's objections to acceptance of a plea to the offense of manslaughter. The trial court stated that

"after hearing the testimony up to this time, the charge of murder should not have been made in this case; the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree * * *".

The trial court sentenced defendant to spend three years probation on the manslaughter conviction. On appeal, prosecution raises two principle allegations of error. We will speak to each one as presented.

Prosecution first contends that the trial court erred by accepting defendant's plea to the offense of manslaughter over objection.

We do not believe extended analysis is required in order to resolve this issue. Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 250 NW2d 145 (1974). See People v Morgan, 63 Mich App 686, 688; 235 NW2d 154 (1975). In Genesee Prosecutor, the Michigan Supreme Court held that error was committed when a trial court accepted a plea of guilty to a lesser included offense to the offense charged where the plea was taken over the prosecution's objections. Defendant there was charged with murder. The trial judge accepted defendant's plea to the offense of manslaughter over the prosecution's objection. The Supreme Court held that the trial court committed reversible error in so accepting the plea. Genesee Prosecutor v Genesee Circuit Judge, supra at 121-123. See also Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 684; 194 NW2d 693 (1972).

We find this case controlled by the Genesee Prosecutor decisions. Read together, those two cases prohibit a trial court from accepting a plea to a lesser included offense over prosecution's objection. The trial court in the instant case accepted defendant's plea to the offense of manslaughter over the prosecutor's objection.

At the time the judge accepted the plea, the two remaining prosecution witnesses might very well have, through their testimony, proved the elements beyond a reasonable doubt that the trial judge thought were lacking. We feel he should have heard those witnesses.

We must next decide whether prosecution is barred from retrying defendant on the charged offense of first-degree murder because the trial court accepted defendant's plea of guilty to the offense of manslaughter after the trial had begun.

The Michigan Supreme Court has held that where a plea of guilty to the lesser offense is accepted but reversed because of non-compliance with the guilty plea rule prosecution cannot reprosecute defendant on the higher, originally charged offense. People v McMiller, 389 Mich 425, 434; 208 NW2d 451 (1973). However, in Genesee Prosecutor, the Supreme Court held that McMiller does not bar reprosecution on the original charged offense where prosecution seeks appellate relief from the incorrect acceptance of the guilty plea over the prosecutor's objections. Genesee Prosecutor v Genesee Circuit Judge, supra at 123.

We believe Genesee Prosecutor applies in this case and that no double jeopardy arises even where defendant's plea was accepted after trial had commenced. As the Supreme Court observed in McMiller, defendant in this case "was never in peril of being convicted and punished for murder [the higher charge]. He has not 'run the gauntlet' on that charge." People v McMiller, supra at 431. We thus find retrial on the original charge reasonable and proper. Genesee Prosecutor v Genesee Circuit Judge, supra at 122-123.

Reversed and remanded for trial on the charged offense of first-degree murder.

APPENDIX "B"

State of Michigan
Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

v No. 60502

ELVA JEAN ANDERSON,
Defendant-Appellant

Before the Entire Bench

Levin, J.

After the prosecution had examined some, but not all, of its witnesses in a murder case, the trial judge, over vigorous prosecutorial objection, accepted Anderson's plea of guilty to the charge of manslaughter, dismissed the murder charge and discharged the jury. The prosecution seeks, by this appeal, the opportunity to retry Anderson on a charge of first-degree murder. The issue is whether retrial is barred by the Double Jeopardy Clause.[1]

We hold:

The trial judge's action represented a resolution of "some or all of the factual elements" of the murder charge and was therefore an acquittal for double jeopardy purposes, barring reprosecution. It is irrelevant that the acquittal
a) was not so denominated by the trial judge, b) may have been erroneous both procedurally and in terms of the questions of law on which it was founded, and
c) came about with defendant's cooperation and consent.

I

Elva Jean Anderson was charged with first-degree murder. Willie Young testified that he saw her shoot and kill Willie Ray Russell.[2]

Young, a doorman at a hotel, testified that Barbara Golden and Russell came to the hotel and went to the front desk. Golden kept looking "funny" at Young. She talked with the desk clerk and with Young. After Young said, "You turn around and go on back out the door. I don't want no trouble in here," Russell left the hotel. Golden made a telephone call, and then waited with Young in the hallway of the hotel.

About 20 minutes later, a taxicab pulled up and two passengers stepped out; Anderson was one of them. Golden ran up to Anderson, who slapped her. Anderson, Golden and the other person who had arrived in the cab walked around the side of the hotel. About two to three minutes later, Young saw Anderson pull a shotgun out of her "britches" and open the door to the car in which Russell was now sitting. A brief conversation ensued, Young heard Golden say "don't shoot him," and then he heard a shot. After the shot, Young heard Anderson say "[m]other fucker, I bet you won't try to rape nobody else."

Anderson was bound over on a charge of first-degree murder. A pretrial motion to quash was denied.

At trial, the prosecution had presented its first five witnesses, but had not yet completed presenting its case, when the judge entertained a motion for reduction of bond. Over the prosecutor's objection the judge granted Anderson's release on personal bond, stating that "the proofs [of murder] in this case are not strong."

Thereupon, an off-the-record side bar conversation was held with counsel. Immediately thereafter, following an apparently brief conversation

between Anderson and her counsel, she offered to plead guilty to a charge of manslaughter.

Over the prosecutor's objection, the judge proceeded to take Anderson's guilty plea, advising her of her rights and establishing a factual basis for her plea. She said that Golden was her lover and had called her saying that a man was waiting outside the hotel with a gun and was trying to rape her and asked Anderson to come pick her up. Anderson said that she brought her shotgun because she believed Golden when she said that a man with a gun was waiting outside the hotel and was trying to rape her. Anderson said that she approached the car in which Russell was sitting because she believed that he had attempted and still intended to rape Golden. She asked Russell to get out of the car, "because I didn't want to shoot him," and repeated the request several times. Anderson thought that Russell "was digging for a gun or something" and when he didn't come out she shot him.

The judge accepted Anderson's plea to the charge of manslaughter, said he was dismissing the "charges of murder in the first degree and murder in the second degree" and discharged the jury.[3]

The Court of Appeals reversed and remanded for trial on first-degree murder. It held that the judge was not authorized to accept a plea to a lesser offense and dismiss the murder charge over the prosecutor's objection, and declared that "no double jeopardy question arises."

II

The people contend, relying on Genesee Prosecutor I and Genesee Prosecutor II,[5] that the Court of Appeals correctly found that the judge erred in dismissing the murder charge. Anderson claims that the Double Jeopardy Clause bars further prosecution for murder whether the judge erred or not. We agree that

reprosecution is constitutionally impermissible.

In Genesee Prosecutor I this Court held that a judge is not authorized, over the prosecutor's objection, to accept a plea of guilty of an offense not charged or included in the information or indictment. Genesee Prosecutor II enlarged this holding and declared that a judge cannot, over the prosecutor's objection, accept a plea of guilty of a lesser included offense and dismiss the charge of the greater offense; we set aside a plea of guilty of manslaughter and remanded for trial on the charged offense of murder. In those cases, however, the plea was offered and the charge dismissed before trial and impaneling of a jury. We noted that there was no double jeopardy issue in Genesee Prosecutor II because the defendant "has not been tried for murder."[6]

The judge's actions in accepting a plea of guilty of the lesser offense of manslaughter and dismissing the murder charge appear to have been violative of Genesee Prosecutor II. It is, however, a separate question, one controlled by the decisions of the United States Supreme Court, whether the Double Jeopardy Clause would be violated by a retrial of Anderson for murder after jeopardy had attached in respect to that charge. We conclude (part III, infra) that the Double Jeopardy Clause would be violated by retrial because the judge made a factual determination upon the prosecutor's proofs that one or more elements of murder could not be established. This is true notwithstanding that the judge's acceptance of a plea to a lesser offense over the prosecutor's objection appears to have violated the specific dictates of Genesee Prosecutor II.

A

The constitutional protections of the Double Jeopardy Clause are implicated only when jeopardy has "attached." Jeopardy attaches in a jury trial when the jury has been impaneled and sworn.[7]

The Clause secures the defendant's interests in (1) the finality of judgments,[8] and (2) protection against multiple prosecutions.[9]

If a trial ends in a judgment of acquittal, both interests are implicated, and there can be no retrial.[10] This has been called " the most fundamental rule in the history of double jeopardy jurisprudence,"[11] and is absolute. It applies whether the acquittal is based on findings of a judge or the verdict of a jury,[12] and whether it is erroneously based[13] or brought about with the defendant's voluntary participation.[14]

Where, however, the trial or proceeding does not end in a judgment of acquittal or conviction, only the second interest is implicated, and the constitutional protections are not absolute. The defendant has an interest in avoiding harassment from repeated proceedings[15] and in having his guilt decided by the jury impaneled to try him.[16] The people, however, have a competing interest in having one complete opportunity to try those accused of breaking the law.[17] Where there is no judgment of conviction or acquittal, these interests are balanced.[18]

If the trial or proceeding ends without the defendant's consent, further prosecution is generally barred; the defendant's "valued right to have his trial completed by a particular tribunal"[19] was taken from him, and reprosecution smacks of harassment. An exception is recognized, and retrial permitted, where "manifest necessity" compelled the termination of the first trial or proceeding.[20]

Where the defendant himself brings about the termination of the proceeding on a basis unrelated to factual guilt or innocence, retrial is generally permitted.[21] The defendant, having deliberately chosen to take the case from the jury cannot complain of the loss of the first trier of fact or of prosecutorial

harassment through multiple prosecutions; he must live with "the consequences of his voluntary choice."[22] An exception is made, and retrial barred, when the defendant's motion is induced by bad faith conduct of the prosecutor or judge.[23]

B

The prosecution contends that it is apparent from statements by the judge following acceptance of the guilty plea and dismissal of the murder charge that he merely found an abuse of discretion in the pretrial charging process. From this it argues that the trial did not end in an acquittal on the murder charges --there was no "final judgment" that Anderson has an interest in preserving; because the trial was terminated on a basis unrelated to factual guilt or innocence, with Anderson's cooperation and over prosecutorial objection, her interests are subordinate to those of the people; she cannot complain of harassment by multiple prosecution; the people seek only "one fair opportunity" to convict, which was wrongfully taken from it by the judge.

We reject the premise of the people's argument. We conclude that the judge's action was an acquittal of the murder charges for double jeopardy purposes. No balancing of interests is required; reprosecution is barred.

III

To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions. "[T] he trial judge's characterization of his own actions cannot control the classification of the action,"[24] What constitutes an "acquittal" is not controlled by the form of the judge's action.[25]

To decide how a trial judge's action should be characterized, the reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[26] There is an acquittal and retrial is impermissible when the judge "evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction."[27]

We conclude that the judge's decision to accept Anderson's mid-trial plea and to dismiss the murder charge involved a resolution of factual elements of the offense charged, and was based on his belief, correct or incorrect, prematurely formed or not, that the evidence was insufficient to support a conviction of murder.

A

In accepting Anderson's plea to manslaughter, the judge considered her factual guilt or innocence of that lesser offense. The judge examined Anderson to determine whether there was a factual basis for her plea. The judge found that she had committed manslaughter.

The transcript convinces us that the judge chose to accept this plea to manslaughter because he concluded that Anderson had not committed murder.

The prosecution emphasis the judge's statements that he was merely granting Anderson's pretrial motion to quash the information charging murder. But those statements were made only as an afterthought in response to the prosecutor's arguments and objections.

The judge expressed his belief that there is an exception to the Genesee Prosecutor cases when the prosecutor has abused his charging discretion and said that the exception "does not apply" "to this case except to the following extent":

"The Court would find in this case after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the judge who conducted the examination in this case, if she had heard the testimony that has been given in this court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case." (Emphasis supplied)

The judge proceeded to explain his understanding of the law of homicide, particularly the defenses of excuse and justification.[28] On the basis of this understanding, he expressed his belief that the prosecution had not and could not overcome Anderson's assertion of a justification defense.

"The people, nevertheless, in a case have the burden of proving that it was not a case of justification, or excuse - this has been held in a number of recent cases and the People must also prove a number of other exceptions to the law - that it was not an accident, for instance, and, in this particular case, we are dealing with the situation of a private citizen who took the law into her hands and killed another person - as she says - enforcing the law.

* * *

"In determining whether the defendant was justified under these circumstances the matter must be determined from lthe standpoint of the defendant in the case, not from te standpoint of

the officers - the officer in charge of the case, nor from the standpoint of the prosecutor, or the judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was - under these definitions, if the defendant had only used reasonable force in the case, she would have been justified under the circumstances of this case.

"The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in his case but that she went beyond reasonable force in the case, and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policement, in making an arrest, uses excessive force and commits a homicide - the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this court dismisses the - court grants Mr. Roth's motion filed prior to the trial of this case to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter to which the defendant has just pled guilty in this case." (Emphasis supplied)

After the prosecutor objected that there was sufficient evidence to sustain a conviction and that he had two more res gestae witnesses that the court had not allowed to testify, the judge responded:

"[T]he Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and secondgree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

* * *

"You are overlooking the fact that the law -it is clearly established that in determining matters of this kind, it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case." (Emphasis supplied)

Another prosecutor then appeared to add his protest to that previously made. He also inquired whether "by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?" Defense counsel responded negatively. The judge then said "that is a question that would properly have to be determined by the United States Supreme Court." He indicated that his decision was not based on an examination of the preliminary examination transcript, saying that he had felt that "based on the testimony taken at the examination, that the prosecution was justified in taking the matter to trial without any reduced plea." He then added somewhat gratuitously that "if the examining magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first-degree murder in this case."

The judge did not determine that there was a defective information or dismiss the murder charges on a gound unrelated to Anderson's guilt or innocence;[29] he did not find an abuse of discretion by the examining magistrate or prosecutor. He determined, rather, that Anderson could assert a defense of excuse, that its merits must be assessed from the standpoint of her reasonable belief, and that, based on what he had heard

at trial, the prosecution had not proved and could not prove beyond a reasonable doubt that she did not believe the killing was necessary to prevent the commission of a felony. The witnesses up to that point had not given testimony disproving excuse "from the belief and position of the defendant" and the judge was convinced that testimony of the remaining witnesses would, for the same reason, be insufficient.

That ruling was a determination of Anderson's factual innocence of murder, although rested on questions of law.

The United States Supreme Court has held that an appellate ruling that there was insufficient evidence to rebut an insanity defense was "a resolution, correct or not, of some or all of the factual elements of the offense charged," and thus an acquittal barring reprosecution.[30] Subsequently, commenting on that holding, the Court elaborated:

> "The defense of insanity, like the defense of entrapment, arises from 'the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense' * * * where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts. Such a factual finding does 'necessarily establish the defendant's lack of criminal culpability' * * * . By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." (Emphasis in original)[3]

A defense of excuse or justification, like defenses of insanity or entrapment, "necessarily establishes lack of culpability" within the meaning of the passage just quoted, because it goes to the central issue of criminal

intent.[32] It is irrelevant that the resolution of the factual issue depended on rulings of law concerning the defense of excuse and justification.[33]

B

Once it is determined that the judge resolved factual questions dispositive of elements of murder in Anderson's favor, it follows that retrial for murder is barred.

Fong Foo v United States[34] highlights that the rule prohibiting retrial after acquittal is absolute. After three government witnesses had testified, and while a fourth was in the process of testifying, the trial judge directed verdicts of acquittal and entered formal judgments accordingly. He advanced two reasons for doing so: there was improper conduct on the part of the prosecutor and the witnesses lacked credibility. The Court of Appeals set aside the acquittals and ordered retrial. The Supreme Court reversed in a brief opinion, holding that because the trial terminated in final judgments of acquittal, government appeal was barred even though "[t]he Court of Appeals thought, not without reason, that the acquittal was based upon egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed * * * without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' United States v Ball, 163 US 662, 671 [16 S Ct 1192; 41 LEd 300 (1896)]."[35]

In Sanabria v United States, 437 US 54; 98 S Ct 2170; 57 LEd 2d 43 (1978), where the judge excluded certain evidence and acquitted the defendant for evidentiary insufficiency, the Court, on the basis of Fong Foo, held that retrial was impermissible and observed that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous."[36]

In the instant case, the judge should have allowed the prosecution to present all of its witnesses. He could then have entertained a motion for a directed verdict. Fong Foo demonstrates, however, that a procedural error, even of this magnitude, does not change the finality of an acquittal, any more than would an erroneous determination of the elements of the crime charged.

Citing United States v Scott, 437 US 82, 98 SCt 2187; 57 LEd 2d 65 (1978);[37] Lee v United States,[38] and United States v Dinitz, the people argue that retrial is permitted after a defendant causes or participates in termination of trial on a basis unrelated to factual guilt or innocence. That argument, however, falls with its premises that the first trial was brought to a close "on a basis unrelated to factual guilt or innocence."

The trial in Dinitz ended in a mistrial after the judge expelled one of the defendant's lawyers. In Scott, the indictment was dismissed because of preindictment delay. In Lee, the information failed to list all the elements of the offense charged. In none of those cases was the termination of proceedings related to factual guilt or innocence. Since the dismissal here was related to Anderson's factual guilt or innocence, it is irrelevant that she consented to, or even requested, the judge's action terminating the trial.[39]

Although a judge should not rule on the sufficiency of the evidence until the prosecutor has had an opportunity to present his entire case and while the principle underlying the Genesee Prosecutor cases is of considerable importance, these precepts must yield to the rights secured by the Double Jeopardy Clause.

We reserve the judgment of the Court of Appeals.

/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams
/s/ John W. Fitzgerald
/s/ James L. Ryan
/s/ Mary S. Coleman
/s/ Blair Moody, Jr.

[1] US Const, Am V; Const 1963, art 1, § 15.

[2] The facts are taken from the transcript of the preliminary examination. The strenographic notes of the three day trial have not been transcribed except for the colloquy concerning Anderson's plea of guilty of manslaughter.

[3] Anderson was sentenced to three years' probation on the manslaughter charge.

[4] Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672; 194 NW2d 693 (1972).

[5] Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974).

[6] Id., p 123.

[7] Crist v Bretz, 437 US 28; 98 S Ct 2156; 57 LEd 2d 24 (1978).

[8] Id, p 33; Brown v Ohio, 432 US 161; 97 S Ct 2221; 53 LEd 2d 187 (1977); United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 LEd 2d 543 (1971) (plurality opinion).

[9] United States v Scott, 437 US 82, 92; 98 S Ct 2187; 57 LEd 2d 65 (1978); Arizona v Washington, 434 US 497, 503-505; 98 S Ct 824; 54 LEd 2d 717 (1978); Green v United States, 355 US 184; 78 S Ct 221; 2 LEd 2d 199; 61 ALR 2d 1119 (1957).

[10] Sanabria v United States, 437 US 54, 64; 98 S Ct 2170; 57 LEd 2d 43 (1978); United States v Scott, supra, pp 91, 96; United States v Martin Linen Supply Co., 430 US 564, 571; 97 S Ct 1349; 51 LEd 2d 642 (1977); Fong Foo v United States, 369 US 141, 143; 82 S Ct 671; 7 LEd 2d 629 (1962).

Although retrial following an acquittal is barred, the government may appeal, is sought, e.g., where the judge

enters an acquittal on a post-trial motion. United States v Wilson, 420 US 332; 95 S Ct 1013; 43 LEd 2d 232 (1975).

11 United States v Martin Linen Supply Co., supra, p 571.

12 Sanabria v United States, supra, p 64, fn 18; United States v Scott, supra, p 91; United States v Martin Linen Supply Co., Fong Foo v United States, supra.

13 Sanabria v United States, supra, p. 64; United States v Scott, supra, p 98; Fong Foo v United States, supra.

14 Sanabria v United States, supra; cf. United States v Scott, supra, pp 98-101.

15 " '[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " United States v Scott, supra, p 87, quoting Green v United States, supra.

"There are a number of reasons a retrial enhances the risk that 'even though innocent, [the criminal defendant] may be found guilty.' * * * A retrial affords the Government the opportunity to re-examine the weaknesses of its first presentation in order to strengthen the second. And, as would any litigant, the Government has been known to take advantage of this opportunity. It is not uncommon to find that prosecution witnesses change their testimony, not always subtly, at second trials. See Arizona v Washington, 434 US 497, 504, fn 14 [98 S Ct 824; 54 LEd 2d 717] (1978), quoting Carsey v United States, 129 US App DC 205, 208-209; 392 F2d 810, 813-814 (1967)." United States v Scott, supra, p 105, fn 4 (Brennan, J., dissenting).

16 Downum v United States, 372 US 734, 736; 83 S Ct 1033; 10 LEd 2d 100 (1963).

17 United States v Scott, supra, p 100; Arizona v Washington, supra, p 509.

18 United States v Scott, supra, p 92; see, also, United States v Jorn, supra, pp 480-482 (plurality opinion); Wade v Hunter, 336 US 684, 689; 69 S Ct 834; 93 LEd 974 (1949).

19 Wade v Hunter, supra, p 689.

20 "Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." Arizona v Washington, supra, p 505. See, also, e.g., United States v Scott, supra, pp 92-93.

21 United States v Scott, supra, p 100. See United States v Dinitz, 424 US 600, 607-608; 96 S Ct 1075; 47 LEd 2d 267 (1976); United States v Jorn, supra, pp 484-485 (plurality opinion).

22 United States v Scott, supra, p 99.

23 Lee v United States, 432 US 23, 33-34; 97 S Ct 2141; 53 LEd 2d 80 (1977); United States v Jorn, supra, p 485 (plurality opinion).

24 United States v Scott, supra, p 96, quoting United States v Jorn, supra, p 478, fn 7 (plurality opinion). See United States v Martin Linen Supply Co, supra.

In the following cases the trial judge's characterization was held not to be controlling in determining whether there had been an acquittal: United States v Appawoo, 553 F2d 1242 (CA 10, 1977) (trial judge's "acquittal" held

not an acquittal for double jeopardy purposes); United States v Hill, 473 F2d 759 (CA 9, 1973) (dismissal of indictment held to be an acquittal for double jeopardy purposes). See, also, United States v Sisson, 399 US 267; 90 S Ct 2117; 26 LEd 2d 608 (1970) (post-trial order in arrest of judgment held to be an acquittal, based on now repudiated definition of double jeopardy "acquittal").

[25] United States v Martin Linen Supply Co, supra, p 571.

[26] Id.

[27] Id., p 572. See People v Hampton, 407 Mich 354, 385-386; 285 NW2d 284 (1979) (Ryan, J.).

[28] The judge expressed his belief that it was justifiable homicide for a person to kill another so as to prevent "atrocious felonies, accompanied with violence and personal danger to others * * * the person making the attempt may, by the common law, if he cannot be otherwise prevented, be killed on the spot and the law will not recognize the act as a crime. In cases of this sort, in order to justify the homicide, it must appear that there were good grounds for a suspicion that the person killed had a felonious intent."

[29] See United States v Scott, supra, p 98 (allowing retrial where the dismissal was for pre-indictment delay).

[30] Burks v United States, 437 US 1, 10; 98 S Ct 2141; 57 LEd 2d 1 (1978).

[31] United States v Scott, supra, pp 97-98.

[32] See, also, Comment, 1978 Double Jeopardy Cases — Mistrials, Dismissals, and Acquittals, 83 Dickinson L Rev 291, 311-312 (1979):

"An example of a legal-factual defense, not mentioned in Scott, that should be unappealable is lack of specific

intent to commit the crime because of the defendant's belief at the time of the act that the underlying statute was unconstitutional. This defense must be distinguished from the strictly legal defense that the statute is unconstitutional. A favorable ruling on the former is a ruling one one of the factual elements of any crime — intent. A favorable ruling on the latter, on the other hand, does not go to culpability or insufficiency of the evidence but, rather, indicates that the defendant, though criminally culpable, cannot be convicted."

[33] It makes no difference that those rulings may have been erroneous: "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' * * * affects the accuracy of that determination, but it does not alter its essential character." United States v Scott, supra, p 98.

[34] Fong Foo v United States, supra.

[35] Id., p 143.

[36] Sanabria v United States, supra, p 64.

[37] Lee v United States, 432 US 23; 97 S Ct 2141; 53 LEd 2d 80 (1977).

[38] United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 LEd 2d 267 (1976).

[39] See fn 14, supra, and accompanying test.

OPINION AND ORDER DENYING
MOTION TO QUASH INFORMATION

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

Opinion & Order Denying Motion to Quash Information

At a session of said Court, held in 803 Frank Murphy Hall of Justice, at Detroit, Wayne County, Michigan, on Monday, August 11th, 1975.

PRESENT: Hon. Thomas L. Poindexter
Recorder's Court Judge

In this case the Defendant, through her attorney, Benjamin Roth, 2600 Cadillac Tower, Detroit, Michigan 48226, has filed a motion alleging that there was insufficient evidence at the preliminary examination held in this cause to justify binding over the defendant on a charge of murder in the first degree, specifically citing the case of People v Hoffmeister, 394 Michigan 144, and also People v Palmer, not yet published.

This Court feels, from the manner of the killing in this case, there is sufficient evidence to go to a jury on the question of whether or not there was premeditation in the case.

The other matters that have been discussed in open Court involve, I believe, a matter of first impression to come before a Court of this system or any other system. We know, for instance, that if a husband or wife is assaulted it may constitute provocation which would reduce the charge to manslaughter in the case. Provocation, if it is

sufficient, has the effect of taking away the element of malice in a homicide case.

As this Court understands the facts in this case it is alleged that the defendant and another woman were living together in a family-type relationship and that an assault was committed upon the other woman by the deceased in this case. Shortly thereafter the defendant shot and killed the deceased. Under the circumstances of the case it is possible that, if the parties had been husband and wife, there would have been a question of provocation to present to a jury.

This is a new situation as far as this Court and, possibly, any other court in that the Courts have never recognized the rights of partners in a lesbian relationship to respond in such fashion resulting in the killing of another party for assaulting the other member of the relationship. It may be that under today's morals that this may be an acceptable relationship and that it would justify such action on the part of the defendant but this Court does not, as yet, recognize the situation as justification or provocation for an assault resulting in the killing of the deceased in this case.

Accordingly, the Motion to Quash the Information is DENIED.

(s) Hon. Thomas L. Poindexter
Recorder's Court Judge

TRANSCRIPT OF MOTION FOR BOND REDUCTION

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

(Jury trial in progress from proceedings of Wednesday, October 8, 1975)

PROCEEDINGS HAD AND TESTIMONY TAKEN in the foregoing entitled cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, and a jury, commencing on Tuesday, October 7th, 1975, and various days and dates as indicated, and this record commencing with proceedings of Thursday, October 9th, 1975.

APPEARANCES: John C. Mouradian, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Elva Jean Anderson.

Detroit, Michigan, at or about 9:30 a.m., Thursday, October 9th, 1975. Hearing of the foregoing matter resumed pursuant to adjournment from Wednesday, October 8th, 1975.

THE COURT: Let the record show that the Court, in this case, People versus Elva Jean Anderson, No. 75-03831, is in progress from yesterday.

The Court has a motion before it at this time filed by counsel for the Defendant, Elva Jean Anderson, for reduction in the bond set in this case.

MR. ROTH: Yes, your Honor.

THE COURT: Mr. Mouradian, will you remain in the court room?

MR. MOURADIAN: Yes, your Honor. I wish to speak to the motion also.

THE COURT: You may proceed, Mr. Roth?

MR. ROTH: Yes, your Honor, at this time I would request that the defendant be released on personal bond. She has been a resident of the State of Michigan all her life and is employed, or she was before being incarcerated in this case, by the Chrysler Corporation as an Inspector. She was laid off and recalled in the month of May while she was incarcerated.

THE COURT: Mr. Mouradian?

(3)

MR. MOURADIAN: May I ask what the bond is in this case?

THE COURT: She is remanded.

MR. MOURADIAN: Well, the People would, first of all, feel that remand is proper in a first degree murder case. I think it is already on the record that she went there, in fact, with the intention of killing the man and she did.

THE COURT: That may be so, Mr. Mouradian, but the Court feels that it was misled at the beginning of the case.

There was a written motion to dismiss on behalf of the defendant. The Court, at that time, read the transcript of the preliminary examination held in the case and felt, at that time, that there was, shall we

say, considerable evidence of first degree murder -- the Court was of the opinion in that regard.

The statute permits bail in all cases except murder where the proofs are strong, and the Court feels that the proofs in this case are not strong; accordingly, the Court will release the defendant on personal bond in this case. The Court feels that if it had had all the information it has now at the beginning of this case, the defendant would never have been remanded.

(4)

MR. MOURADIAN: May we approach the bench, your Honor?

THE COURT: Will both counsel come forward. (Off record conversation.)

Ms. Anderson, will you come forward? (Defendant before the Court.)

The Court has entered an order that you may be released on personal bond in this case - the bond will be $1,000.00 personal bond.

MR. ROTH: May I have a moment, your Honor, to talk with Ms. Anderson? (Off record conversation between defendant and counsel.)

MR. ROTH: Your Honor, at this time we would wish to offer a plea of guilty in this case to the charge of manslaughter.

THE COURT: Very well, will you fill out the plea forms?

MR. ROTH: Certainly.

(Whereupon an off the record conversation was had.)

(Thereafter, the Court proceeded to take a plea

of guilty to the charge of manslaughter, which is transcribed and previously filed.)

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PLEA OF GUILTY TRANSCRIPT

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs
Elva Jean Anderson)
(Docket No. 75-03831)

Plea of Guilty

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled Cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, on Thursday, October 9th, 1975.

APPEARANCES: John C. Mouradian, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Elva Jean Anderson.

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(2)

Detroit, Michigan. Thursday, October 9th, 1975.

THE COURT: This is Case No. 75-03831, People versus Elva Jean Anderson.

MR. ROTH: Defendant, your Honor.

THE COURT: Defendant, you have been charged in this case with murder in the first degree, which is a felony carrying mandatory life imprisonment.

Included in that charge are two included offenses: murder in the second degree, which is also a felony and carries any punishment up to life imprisonment or imprisonment for any term of years to be fixed by the Court.

There is a second included offense of manslaughter, which is also a felony but carries a maximum punishment of imprisonment for fifteen years.

Do you understand the possible charges against you and the possible punishments?

DEFENDANT ANDERSON: I do.

THE COURT: Mr. Roth, are you retained counsel?

(3)

MR. ROTH: No, I am assigned counsel, your Honor.

THE COURT: The Court appointed Mr. Roth as your attorney in the case; are you satisfied with his representation and are you acting on his advice in this matter?

DEFENDANT ANDERSON: Yes, I am.

THE COURT: I have here a guilty plea form; is that your signature?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: And in this form you offer a plea of guilty to the charge of manslaughter, the fifteen year maximum felony; is what (sic) your wish at this time?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: And I'll ask at this time what is the attitude of the Prosecution towards the plea?

MR. MOURADIAN: The Prosecution opposes the plea and has not made any plea offer in this case and we object to the plea on this record.

THE COURT: Very well, the Court will find at this time that the Court will proceed with the

(4)

taking of the plea and state the reasons why the Court thinks it is proper to take the plea at this time.

THE COURT: This plea form states that you are not on probation or parole in any case at this time; is that correct?

DEFENDANT ANDERSON: Right.

THE COURT: Have any promises been made to you by any person in order to get you to plead guilty to the charge of manslaughter in this case?

DEFENDANT ANDERSON: No, it hasn't.

THE COURT: You understand that this Court recognizes no promises whatsoever in this case, and would feel free to make any sentence up to the maximum that is permitted in this case?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: You also understand that if you wanted you could complete the trial which has been going on in this case -- a jury has been impanelled, witnesses sworn and testimony taken -- you could continue with the jury trial or it is possible that, if you so moved, the Court might decide to waive the jury and try the case without a jury; do you understand that?

DEFENDANT ANDERSON: Yes, I do.

(5)

THE COURT: You understand that you have the

right to be presumed innocent until proven guilty beyond a reasonable doubt?

DEFENDANT ANDERSON: Yes.

THE COURT: You have the right to hear and question the witnesses against you in open court?

DEFENDANT ANDERSON: Yes.

THE COURT: You have the right to have the Court's assistance to compel witnesses to come to court and testify in your behalf and to have compulsory process for that purpose?

DEFENDANT ANDERSON: Right.

THE COURT: And you have the right to remain silent or to testify at the trial, which ever you choose, and if you remain silent no inferences adverse to you may be drawn either by the Judge or jury in the case.
Do you understand those rights --

DEFENDANT ANDERSON: Yes, I do.

THE COURT: -- that you have as a defendant in this case?

DEFENDANT ANDERSON: Yes, I do.

(6)

THE COURT: And I assume that Mr. Roth, as a careful attorney, has explained all those rights to you?

DEFENDANT ANDERSON: Yes.

THE COURT: You understand, however, that by offering a guilty plea in this case you -- to the charge of manslaughter -- with regard to that charge you are

giving up your right to trial either by jury or by the Court?

DEFENDANT ANDERSON: Yes.

THE COURT: You are giving up your presumption of innocence.

You are giving up your right to confront and cross examine the witnesses in open court.

You are giving up your right to hear -- to have the Court's assistance to compel witnesses to come to court and testify and compulsory process for that purpose.

You are giving up the right to remain silent or to testify at the trial, which ever you choose, and if you remain silent no inferences adverse to you may be drawn either by the Judge or jury in the case.

(7)

Do you understand those rights that you are giving up by offering a guilty plea in this case?

DEFENDANT ANDERSON: Yes.

THE COURT: Now, has anybody -- have any promises at all been made to you by anybody to get you to plead guilty?

DEFENDANT ANDERSON: No.

THE COURT: Has anybody threatened you to make you plead guilty?

DEFENDANT ANDERSON: No.

THE COURT: You are pleading guilty, then, because you are guilty?

DEFENDANT ANDERSON: Right.

THE COURT: And you have talked this over with Mr. Roth and believe it is in your own best interests to offer this guilty plea at this time; is that true?

DEFENDANT ANDERSON: Right -- that's right.

THE COURT: Defendant, the charge in this case is that on May 22nd, 1975, on the east side of 2127 West Grand Boulevard, in the City of Detroit, you,

(8)

Elva Jean Anderson, did feloniously, deliberately, wilfully, with malice aforethought and with premeditation, did kill and murder one Willie Ray Russell, contrary to Section 750.316 of the Compiled Laws, and by your plea you are not -- you are not admitting guilt under the statement as charged, but the information includes, among others, the offense of manslaughter which, under Section 750.321 of the Compiled Laws, is a felony and carries a maximum punishment of fifteen years imprisonment.

Do you understand what you are pleading guilty to? The charge of --

DEFENDANT ANDERSON: Yes.

THE COURT: The charge of manslaughter?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: You understand that the difference between murder in the first degree and, shall we say, either murder in the first degree or murder in the second degree, is the element of malice and the People would have to establish malice in this case, which means that the killing was intentionally done and was without legal excuse or justification, in order to establish the offense of murder in the first degree; in addition to establishing malice, the People would have to establish

(9)

that you premeditated the crime -- in other words, that you had sufficient opportunity -- and I assume that what they would attempt to establish is that while you were coming to the Chocolate Hotel, where the offense occurred, that you had sufficient opportunity to think it over and know what you were doing at that time.

Do you understand that the People would have to prove that?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: To establish murder in the first degree they would have to prove malice, that the killing was intentional and without excuse or justification in order to establish either degree of murder.

You understand that?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: And you, at this time, do you feel that you sufficiently understand the nature of the offenses in order to offer this plea of guilty at this time?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: And it is your wish at this time to offer a plea of guilty to the included offense of manslaughter, which means that the killing

(10)

was unlawfully done, but it was done without malice or premeditation?

Is that your wish at this time?

DEFENDANT ANDERSON: Yes, it is.

THE COURT: This address, on the east side of 2127 West Grand Boulevard, in the City of Detroit, that is the address of the Chocolate Bar; is that right?

DEFENDANT ANDERSON: That's right.

THE COURT: And that is in the vicinity of the Town Bar, which is across the street; is that right?

DEFENDANT ANDERSON: That's right.

THE COURT: And both of those addresses or locations are addresses or locations within the City of Detroit; is that correct?

DEFENDANT ANDERSON: That's right.

THE COURT: Very well. Will you tell the Court in your own words what you did for the purpose of determining whether the plea should be accepted -- will you tell the Court in your own words what you did so that the Court, from the beginning of the events so that the Court can determine whether the plea of guilty

(11)

to the charge of manslaughter should be accepted?

DEFENDANT ANDERSON: Well, do you want me to tell you what happened?

THE COURT: I understand you first came into this by receiving a telephone call --

MR. ROTH: By a telephone call -- start from the telephone call and then what happened --

THE COURT: I suggest you start with the phone call and tell what you did from then on?

DEFENDANT ANDERSON: I got the phone call and Barbara was telling me that --

THE COURT: Speak up a little louder, so the Reporter can hear you?

DEFENDANT ANDERSON: I got the -- I received a phone call and Barbara told me that the man was out there with a gun and he was trying to rape her; okay, then she said, "Come pick me up," and so I took my 12 guage 'cause -- because I thought, you know, I might get shot myself, and called a cab and so I caught the cab and got outside the -- got to the --

THE COURT: When you say your 12 guage -- do you mean the gun that is lying there on the table (indicating)?

(12)

DEFENDANT ANDERSON: Yes.

THE COURT: You may proceed.

DEFENDANT ANDERSON: And I got out the cab when I got there, and she come running out the gate and she said, "The man is on the side of the building," and I say, "he is," and she said, "yes," and so we walked around on the side of the building and he honked his horn, and when he honked his horn I walked over -- she said, "That's the man right there," and I walked over there to talk to him. And when I walked over to him he said -- my gun went off in the street -- and he ducked down in his car, and when he ducked down in his car I walked faster -- quickly over there to his car, pulled the door open and told him, I said, "Come on out," you know, because I didn't want to shoot him, and I told him about three times and he was steady up under the car, like he was digging for a gun or something, you know, and so I kept on telling him to come on out, you know,

because I didn't want to shoot him and I told him I wasn't going to let him hurt me, and so he didn't come up, you know, and I shot him.

THE COURT: Did you believe at the time that you went to the car in which the deceased was seated

(13)

that he was -- had attempted and was intending to rape Barbara Golden, a witness in this case?

DEFENDANT ANDERSON: Yes.

THE COURT: And had you been told that he had a gun?

DEFENDANT ANDERSON: Yes, I had.

THE COURT: And did you believe it to be so, that he had a gun?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: And did you believe the information that he had attempted to rape Barbara Golden?

DEFENDANT ANDERSON: Yes, I did.

THE COURT: And that he was waiting outside at that time?

DEFENDANT ANDERSON: Yes, I did.

THE COURT: And had she told you that he was waiting outside at that time to intercept her at the time that she came out?

DEFENDANT ANDERSON: She didn't know.

THE COURT: But did she say that he was waiting outside there to stop her from coming out?

DEFENDANT ANDERSON: I don't know;

(14)

she didn't tell me that.

THE COURT: But you stated before that she called you over the phone and told you that he was waiting for her and he had a gun?

DEFENDANT ANDERSON: Yes, that's what she told me on the phone but I didn't know whether he was still out there because when I reached the hotel I didn't see anyone out there.

THE COURT: Any questions you think should be asked Mr. Mouradian?

MR. MOURADIAN: I have no questions.

THE COURT: Very well. Based on the admissions of the defendant in open court and the offered plea of guilty the Court will find the defendant, Elva Jean Anderson, guilty of manslaughter in the manner alleged in the criminal information on file in this cause and in violation of Section 750.321.

The Court will dismiss the count of murder in the first and second degrees in this case.

As I understand, the People -- you may step down, Miss Anderson.

The Court will set November 25th as the date for sentencing in this case --

(15)

MR. ROTH: November 24th would be more convenient, if the Court please?

THE COURT: Very well, sentence will be set for November 24th.

The People have not concurred in the acceptance of a plea to manslaughter in this case and dismissal of the charges of murder in the first degree and murder in the second degree.

Under some circumstances, it has been held -- in the case of the Prosecutor versus Genesee County Judge -- that a trial judge -- that a judge in a case may not accept a plea of guilty to a reduced charge in any case without the concurrence of the Prosecutor's Office. There are some exceptions to that rule.

It has been indicated to the Judges by Supreme Court judges, informally, that if there is an abuse of discretion on the part of the Prosecutor's Office that a Judge may exercise discretion in accepting a plea. This Court does not apply that rule to this case except to the following extent:

The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case;

(16)

that the Judge who conducted the examination in this case, if she had heard the testimony that has been given in this Court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case.

We are dealing with a part of the law which rarely comes before the Court, and that is the right of a private citizen to enforce the law to the extent of killing another person on the claim that that person was committing a serious felony, dangerous to life or limb,

so that it was necessary to kill that person so as to prevent the commission of a felony.

This is a type of defense or exception to the law of murder or homicide that does not arise very often, but is, nevertheless, a well-recognized part of the law.

Recently, the Committee of the State Bar prepared a set of instructions in Homicide cases and,

(17)

strangely enough, there was nothing said in the instructions defining either justification, excuse, provocation, or mitigation as it applied to a charge of murder.

The People, nevertheless, in a case have the burden of proving that it was not a case of justification, or excuse -- this has been held in a number of recent cases and the People must also prove a number of other exceptions to the law -- that it was not an accident, for instance, and, in this particular case, we are dealing with the situation of a private citizen who took the law into her own hands and killed another person -- as she says -- enforcing the law.

Now, the exceptions that have been recognized to the law of homicide, including justification and excuse, are discussed in a well-written article in Volume 14 of the Encyclopaedia (sic) American, under the heading, "Homicide," and in Volume 18, under the heading, "Manslaughter," and the Court will read certain provisions that are stated therein.

Now, the first one is the exception of a public official killing a person in the enforcement of the law, either by way of execution or in making an arrest or resisting an escape, or suppressing a mob, or

(18)

other incidents of that kind.

And, in this respect, it is said, in discussing the duties and rights of private citizens, it is said, "It is,

however, laid down as law that if a felony be committed, and the felon attempts to flee from justice, it is the duty of every private citizen to use his best endeavor to prevent an escape, and if in the fresh pursuit the party be killed where he cannot be taken alive, it will be deemed a justifiable homicide. The same rule applies to cases of an attempt on the part of a felon to break away and escape after he has been arrested, and is on the way to jail."

I only read this section because it indicates instances where a private citizen is justified and required by law even to make an arrest -- even to the extent of committing a homicide.

We have another exception to the law and that is in the case where a person, in self defense, or defense of a member of the family, commits a homicide and, with regard to that, the article says:

"The ground of excuse of homicide, in case of provocation merely, is the supposed sudden passion, some influence of which the law concedes to

(19)

the frailty of human nature. But the excuse of self defense goes still further; and where a man is attacked, so that his own life is endangered, or in such way that he may reasonably suppose it to be so, he may repel the attack with mortal weapons."

Now, I have given several instances here where a citizen is justified in committing a homicide and is excused or justified in the eyes of the law. This is not -- I would not gather and I do not think the facts would justify a finding that the defendant was attempting to make an arrest of the deceased in this case and we are not concerned with that exception to the definition of murder. And this is not a situation where the defendant was justified or excused by the law in exercising self-defense and killing a person in self defense. The law says a woman is justifiable in killing one who

attempts to ravish her and if the claim had been made by Barbara Golden in this case that she had killed the deceased in self-defense that might be a possible defense and the other, a husband or a father may be justified in killing a man who attempts to commit rape on his wife or daughter, and that is not the situation

(20)

here because while the parties were living together the defendant is not the husband or father, or there is no family relationship in the case between the case between (sic) the defendant and Barbara Golden.

It has been suggested in this case that there might be a further immoral relationship that is not recognized by the law in this case but which, nevertheless, some people have recently claimed to place parties to a so-called lesbian relationship to intercede on behalf of the other to the same extent that a husband or wife would be justified. That is not the law of Michigan at this time and, therefore, the defendant cannot claim a defense of self-defense on behalf of herself or on behalf of Barbara Golden in this case.

The other article, among other things, says this:

"There are cases which the law regards as only manslaughter, without evidence of momentary excitement; partly because the law infers that from such a provocation there must be excitement; and partly, perhaps, because the party killed brought the death upon himself by his outrageous wrong. Thus, if a husband detects his wife in adultery, and instantly

(21)

and purposely takes either her life or the adulterer's, it is only manslaughter."

That is the (sic) not the situation that we have presented to us in this case, because, as I say, the law does not recognize it, but we now come to the section which directly bears on this case and which is the right

of a private citizen to enforce the law.

Now, under the laws of Michigan, a person who has supposedly committed a crime such as rape cannot be executed, summarily. That was formerly the law in England, but the Magna Carta did away with the right of putting felons to death without a trial, and so the defendant could not justify the offense merely because the deceased had, supposedly, committed a rape upon another person. It should be noted that Michigan has gone further and has absolutely abolished the death penalty for punishment for crime and, therefore, under no circumstances, could the deceased have been put to death for an alleged rape. But that does not mean that a private citizen may not enforce the law to prevent the commission of a rape or other vicious crime. In this regard the laws say:

"The law arms every private citizen in the community with the power of life and death for the

(22)

"prevention of atrocious felonies, accompanied with violence and personal danger to others; as in the case of an attempt to murder or rob, or commit burglary or arson," and I may add -- as it says in the next paragraph -- "rape," -- "the person making the attempt may, by the common law, if he cannot be otherwise prevented, be killed on the spot, and the law will not recognize the act as a crime. In cases of this sort, in order to justify the homicide, it must appear that there were good grounds for a suspicion that the person killed had a felonious intent. A woman is justifiable in killing one who attempts to ravish her and the husband or father may be justified in killing a man who attempts a rape on his wife or daughter."

The defendant in this case does not qualify under any of the other exceptions establishing justification or excuse as an exception to the crime, but she was, in this instance, entitled to rely on the facts as they appeared to her at the time of the events that

constituted the homicide. In this case the res gestae witnesses in the case gave testimony that the defendant was called by Barbara Golden and told that the deceased was attempting to rape her and that he was remaining outside

(23)

and that he had a gun.

In determining whether the defendant was justified under these circumstances the matter must be determined from the standpoint of the defendant in the case, not from the standpoint of the officers -- the officer in charge of the case, nor from the standpoint of the Prosecutor, or the Judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was -- under these definitions, if the defendant had only used reasonable force in the case she would have been justified under the circumstances of this case.

The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in this case but that she went beyond reasonable force in the case and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policeman, in making an arrest uses excessive force and commits a homicide -- the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this Court dismisses the -- Court grants Mr. Roth's

(24)

motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter, to which the defendant has just pled guilty in this case.

MR. MOURADIAN: Your Honor, I would like to ask the Court one thing --

THE COURT: Mr. Mouradian, the Court has already accepted the plea.

MR. MOURADIAN: All right, but I take it that the Court is granting a mistrial in this case and -- in effect -- at the request of the defendant?

THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case the Court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard.

MR. MOURADIAN: I would just like to

(25)

make a statement as far as the People are concerned:

No. 1, that the People have two more res gestae witnesses that the Court did not allow to testify in this case. Those witnesses -- at least one of them -- would have said that they heard the defendant say prior to killing the deceased that she was going to 'kill the mother fucker.'

That's No. 1.

No. 2, that the People's position is that there was enough on this record to sustain -- to establish that defendant went to that scene with the intention of killing the deceased; he was seated in his car. If you look at the evidence in the light most favorable to the People, Mr. Young stated that the man was asleep in his car. The doctor testified that the man was drunk to the

point of .20 alcohol in his blood system. Nobody saw him with a gun. He never had a gun. His car was searched. His person was searched. He never had a gun. There was no immediate danger to either the defendant or to Barbara Golden, or anyone else in this case, and it is the People's contention, and it was the People's theory in this case that what Miss Anderson did in this was to (1) try the deceased; find him guilty, and execute

(26)

him, and it is the People's theory and the People's belief in this case that this case was nothing but an execution of Mr. Russell. Mr. Russell had no previous police record; he was over 30 years old -- to my knowledge he had no previous police record -- and he was simply a drunken man, asleep in his car and executed by the defendant in this case. It is the People's position that the People had already made out a prima facie case of murder in the first degree.

THE COURT: The Court having heard the testimony in this case --

MR. MOURADIAN: May I have a minute, your Honor?

THE COURT: Yes -- I am going to answer part of what you said -- the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made

(27)

prior to the commencement of the trial in this case.

You are overlooking the fact that the law -- it is clearly established that in determining matters of this kind it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case.

MR. THOMPSON: Your Honor, may I address the Court in this matter?

THE COURT: Yes, will you state your name for the record and position in the matter?

MR. THOMPSON: Yes, your Honor, John Thompson, Assistant Prosecuting Attorney.

Your Honor, I have just come from down stairs to this court room and I haven't heard any of the trial in this case but it is my understanding and I would appreciate the Court correcting me if I am wrong, but it is my understanding that the Court is now in the middle of a jury trial and has taken a plea to manslaughter over the Prosecution's objection?

(28)

THE COURT: Over the Prosecution's objection and despite the decision of the Supreme Court in the case of Prosecutor versus Circuit Court Judge of Genesee County. The Court believes it is not acting contrary to that.

MR. THOMPSON: I don't have it at my fingertips because of the shortness of time, but I believe there is a recent case from the Supreme Court that the Court may go ahead and take whatever pleadings it deems

proper but the Prosecution does not lose the right to retry this case, based on the original charge, and not on the manslaughter plea, as in this case, when and if we should appeal the Court's decision and the Court is reversed, based on the plea in the case.

THE COURT: I understand the purpose of all the high-priced legal talent here today is to appeal the Judge's decision in this case. I am familiar with that and it is my opinion that if the Supreme Court so orders the Court would be required to retry this case.

MR. THOMPSON: I would say that naturally that is our intention -- no matter the Court accepting the plea of what, we intend to appear in this Court and try this case on the original charge of

(29)

first degree murder.

THE COURT: You intend to do that if I am reversed by the Court of Appeals or by the Supreme Court.

MR. THOMPSON: By the Supreme Court.

THE COURT: I may say that there is a possibility, Mr. Thompson, but I have looked at it from all possibilities that I can think of -- it is possible that it could be tried again.

MR. THOMPSON: Do we understand, your Honor, by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?

MR. ROTH: No.

THE COURT: I think that is a question that

would properly have to be determined by the United States Supreme Court.

I have done what I think is proper in this case. In the beginn ng there was a plea offered; the Prosecutor's Office did not approve of the plea at that time, and at that time I felt that, based on the testimony taken at the examination, that the Prosecution was justified in taking the matter to trial without any

(30)

reduced plea. I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the Court is satisfied that the Court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this Court that the defendant would not have been bound over for trial on the charge of first degree murder in this case.

MR. THOMPSON: If that's the case, your Honor, your Honor, (sic) then why did the Court not just simply dismiss the case. I don't understand exactly where the --

THE COURT: Because I have accepted the plea -- I am not prepared to do something just because the Prosecutor wants me to when I am not sure he is right.

MR. THOMPSON: Well, your Honor, I am sure --

THE COURT: Your place to determine that, Mr. Thompson, is either over on Woodward Avenue or in Lansing, but I am satisfied that what I have done is correct both factually, legally, and from a justice standpoint, and I will aide by the position I have taken.

(31)

MR. THOMPSON: We, of course, will abide but do not necessarily agree with it.

THE COURT: You have a perfect right to appeal the case, if you can, and I assume that you will be taking those steps.

I took that into consideration in making my decision and also in making this record -- I wouldn't say that I made a record for that purpose but the record has been thoroughly preserved.

I am also inviting the Supreme Court to consider a rule where the propriety, in my opinion, or the actions are not justified -- the actions of the Prosecutor are not justified by the facts in the case; in other words, to make an exception in the case of the Prosecutor versus Genesee Circuit Court -- of course, only the Supreme Court can make that decision, although I may say that there was some discussion of it at a previous meeting of Judges at which the Supreme Court Justices were present, and I am in hopes that there will be an exception recognized in the law and -- so that I welcome an appeal in the matter.

I may say that we had a meeting of the Trial Judges with the Supreme Court Judges and the

(32)

Trial Judges of the State of Michigan unanimously opposed the decision in the Genesee Case to no avail.

There was some discussion as to what the Supreme Court would do in the event that the facts and justice did not support the Office of the Prosecutor and I think this would be a good case to determine that.

MR. THOMPSON: Thank you, your Honor.

THE COURT: Will you agree on a sentence date.

COURT CLERK: November 24th.

THE COURT: The Court will set November 24th, as the date for sentencing and the bond previously set in the case -- the personal bond -- will be continued.

A probation report will be required.

(Hearing on the foregoing matter was concluded to sentence date.)

# # # # # # #

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs.

ELVA JEAN ANDERSON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE
JAMES R. NEUHARD
Defender

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Counsel for Respondent

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 80-747

STATE OF MICHIGAN,

Petitioner,

-vs-

ELVA JEAN ANDERSON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES ELVA JEAN ANDERSON, RESPONDENT in the above captioned cause, by her attorneys, the State Appellate Defender Office, by Kim Robert Fawcett, and requests this Honorable Court to grant leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Michigan Supreme Court (without pre-payment of costs) and to proceed in forma pauperis pursuant to Rule 46. The Respondent's affidavit in support of this motion is attached hereto.

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: Kim Robert Fawcett
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226

Dated: December 3, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

I, ELVA JEAN ANDERSON, being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forum pauperis, without being required to prepay costs or fees:

1. I am the Respondent in the above captioned cause; I am a citizen of the United State of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently employed. I was last employed by the Chrysler Company in 1975, before my trial. I do not recall my wages.

B. I have not been employed since 1975; I have received no income in the past twelve months from any business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources. I support myself by welfare checks.

C. I do not own any cash or checking or savings account.

D. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

E. I have one minor daughter who is dependent on me for her support

4. I believe that I am entitled to the benefit of the judgment of the United States Supreme Court.

5. I have been found indigent for purposes of: (1) trial in the Detroit Recorder's Court, appeal (2) to the Michigan Court of Appeals, and (3) to the Michigan Supreme Court. On all appeals to date I have been represented by the State Appellate Defender Office, by Kim Robert Fawcett, 1200 Sixth Avenue, Third Floor-North Tower, Detroit, Michigan 48226.

Further, I say not.

Elva J. Anderson
ELVA JEAN ANDERSON

Subscribed and sworn to before me
this 26th day of November, 1980.

Luther A. Bennett

Notary Public, Wayne County, Michigan
My commission expires:

LUTHER A. BENNETT
Notary Public, Wayne County, Mich.
My Commission Expires Feb. 7, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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December 3, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Elva Jean Anderson respectfully requests this Honorable Court to deny the petition for writ of certiorari, seeking review of the opinion issued August 28, 1980 by the Michigan Supreme Court in People v Elva Jean Anderson, 409 Mich 474; 295 NW2d 482 (1980).

OPINIONS BELOW

Respondent accepts as correct the opinion contained in Petitioner's appendices "A", "B", and "C".

COUNTERSTATEMENT OF QUESTIONS PRESENTED

DID THE MICHIGAN SUPREME COURT CORRECTLY HOLD THAT RESPONDENT HAD BEEN ACQUITTED OF MURDER BECAUSE THE TRIAL JUDGE'S ACCEPTANCE OF A MID-JURY TRIAL GUILTY PLEA TO MANSLAUGHTER AND DISMISSAL OF THE ORIGINAL MURDER CHARGE REPRESENTED A RESOLUTION OF SOME OR ALL OF THE FACTUAL ELEMENTS OF MURDER?

DID THE FINDING OF A FACTUAL BASIS FOR THE GUILTY PLEA TO MANSLAUGHTER AND NOT MURDER, THE ACCEPTANCE OF THE PLEA AND THE IMPOSITION OF SENTENCE THEREON COLLATERALLY ESTOP ANY RETRIAL ON THE MURDER CHARGE?

COUNTERSTATEMENT OF FACTS

Respondent Elva Jean Anderson stands convicted of manslaughter, MCL 750.321; MSA 28.533, by her October 9, 1975 mid-jury trial plea of guilty. (Petitioner's Appendix E, p. 29). On November 24, 1975 the Respondent received a sentence of three years probation. (Respondent Appendix B, p. 1c).

On May 22, 1975 Respondent shot and killed a man who had attempted to rape her homosexual lover. (Petitioner's Appendix, C, pp. 22-23; E, pp. 28-30). The testimony at the preliminary examination is summarized in the opinion below, People v Anderson, 409 Mich 474, 479-480 295 NW2d 482, 484-485 (1980), which summary hereby is incorporated by reference. The Respondent was originally charged with first degree (premeditated and deliberated) murder. MCL 750.316; MSA 28.548. A pretrial motion to quash the single count information was denied by the Honorable Thomas Poindexter, the trial judge, who was not the examination Magistrate. (Petitioner's Appendix C, p . 22-23).

Trial by jury began on October 7, 1975. On the 7th and 8th of October, 1975, the prosecution presented five witnesses. (Respondent's Appendix A, p. 1a.) On October 9, 1975, at about 9:30 a.m. and before any witnesses were heard, the Court entertained a motion for reduction of bond. Defense counsel requested Respondent's release on personal bond and the prosecution objected on the ground that personal bond was not appropriate in a first degree murder case. However, Judge Poindexter asserted that he felt the court had been 'misled' at the beginning of the case and that he thought the proofs were strong and had denied the motion to quash on that basis but now he thought the proofs were not strong. The judge said, additionally, that if, at the start of the case he had had before him all the information he now had, he would have granted personal bond. Thereupon Judge Poindexter did grant Respondent's release on personal bond. After counsel approached the bench for an off-record conversation Respondent offered to plead guilty to manslaughter. (Petitioner's Appendix C, pp. 24-27.)

Respondent pled guilty to manslaughter immediately thereafter, over prosecution objection. (Petitioner's Appendix E.)

Judge Poindexter advised Respondent that she could continue the trial although he did not specify on what charge trial might continue:

> "THE COURT: You also understand that if you wanted you could complete the trial which has been going on in this case -- a jury has been impanelled, witnesses sworn and testimony taken -- you could continue with the jury trial or it is possible that, if you so moved, the Court might decide to waive the jury and try the case without a jury; do you understand that?
>
> DEFENDANT ANDERSON: Yes, I do."
> (Petitioner's Appendix E, p. 36.)

Subsequently, the Court stated:

> "THE COURT: You understand, however, that by offering a guilty plea in this case you -- to the charge of manslaughter -- with regard to that charge you are giving up your right to trial either by jury or by the Court?
>
> DEFENDANT ANDERSON: Yes." (Emphasis supplied). (Petitioner's Appendix E, pp. 31-32.)

After examining Respondent regarding the necessary factual basis for the guilty plea, Judge Poindexter accepted the plea of guilty to manslaughter and dismissed the charge of first degree murder and the lesser included offense of second degree murder (Petitioner's Appendix E, p. 38).

The prosecution did not concur in the acceptance of the plea or the dismissal of the murder charges (Petitioner's Appendix E, p. 39).

Judge Poindexter made the following finding for the record:

> "The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the Judge who conducted the examination in this case, if she had heard the testimony that has been given in this Court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case." (Petitioner's Appendix E, p. 39). (Emphasis supplied).

Judge Poindexter then continued to make findings of fact and law in further explanation for his acceptance of the guilty plea to manslaughter and his dismissal of first and second degree murder (Petitioner's Appendix E, pp. 39-50). Judge Poindexter stated in support of his actions that he found Respondent did not use reasonable force to justify the homicide but went beyond reasonable force and committed manslaughter:

> "The defendant in this case does not qualify under any of the other exceptions establishing justification or excuse as an exception to the crime, but she was, in this instance, entitled to rely on the facts as they appeared to her at the time of the events that constituted the homicide. In this case the res gestae witnesses in the case gave testimony that the defendant was called by Barbara Golden and told that the deceased was attempting to rape her and that he was remaining outside and that he had a gun.
>
> In determining whether the defendant was justified under these circumstances the matter must be determined from the standpoint of the defendant in the case, not from the standpoint of the officers -- the officer in charge of the case, nor from the standpoint of the Prosecutor, nor the Judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was -- under these definitions, if the defendant had only used reasonable force in the case she would have been justified under the circumstances of this case.
>
> The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in this case but that she went beyond reasonable force in the case and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policeman, in making an arrest uses excessive force and commits a homicide -- the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this Court dismisses the -- the Court grants Mr. Roth's motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter, to which the defendant has just pled guilty in this case." (Petitioner's Appendix E, pp. 43-45). (Emphasis supplied).

* * *

"THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case the Court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard." (Petitioner's Appendix E, pp. 44-45). (Emphasis supplied).

The prosecution claimed that it still had two witnesses to call and one would testify regarding Respondent's intent to kill and that a *prima facie* case of first degree murder had been established (Petitioner's Appendix E, pp. 45-46). The Court responded as follows:

"THE COURT: The Court having heard the testimony in this case --

MR. MOURADIAN: May I have a minute, your Honor?

THE COURT: Yes -- I am going to answer part of what you said -- the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made prior to the commencement of the trial in this case.

You are overlooking the fact that the law -- it is clearly established that in determining matters of this kind it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case." (Petitioner's Appendix E, pp. 46-47).

The prosecution asserted its intention to appeal and to retry Respondent on the original charge of first degree murder:

"MR. THOMPSON: Your Honor, may I address the Court in this matter?

THE COURT: Yes, will you state your name for the record and position in the matter?

MR. THOMPSON: Yes, your Honor. John Thompson, Assistant Prosecuting Attorney.

Your Honor, I have just come from downstairs to this courtroom and I haven't heard any of the trial in this case but it is my understanding and I would appreciate the Court correcting me if I am wrong, but it is my understanding that the Court is now in the middle of a jury trial and has taken a plea to manslaughter over the Prosecution's objection?

THE COURT: Over the Prosecution's objection and despite the decision of the Supreme Court in the case of Prosecutor versus Circuit Court Judge of Genesee County. The Court believes it is not acting contrary to that." (Petitioner's Appendix E, p. 47). (Emphasis supplied).

Respondent expressly refused to waive the Double Jeopardy Clause's bar to retrial.

"MR. THOMPSON: Do we understand, your Honor, by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?

MR. ROTH: No." (Petitioner's Appendix E, p. 48).

Finally, Judge Poindexter stated his rulings and actions were taken based upon the merits of the case:

"I have done what I think is proper in this case. In the beginning there was a plea offered; the Prosecutor's Office did not approve of the plea at that time, and at that time I felt that, based on the testimony taken at the examination, that the Prosecution was justified in taking the matter to trial without any reduced plea. I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the Court is satisfied that the Court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first degree murder in this case." (Petitioner's Appendix E, pp. 48-49). (Emphasis supplied).

On October 9, 1975, the jury was discharged. Petitioner appealed to the Michigan Court of Appeals.

On August 9, 1977 the Michigan Court of Appeals issued an opinion

reversing the trial court and ordering retrial on first degree murder, notwithstanding Respondent's Motion to Dismiss for lack of jurisdiction on grounds of double jeopardy. People v Anderson, 77 Mich App 357; 258 NW2d 225 (1977). Respondent appealed to the Michigan Supreme Court which reversed, in the opinion below, People v Anderson, 409 Mich 474; 295 NW2d 482 (1980), holding:

> "The trial judge's action represented a resolution of 'some or all of the factual elements' of the murder charge and was therefore an acquittal for double jeopardy purposes, barring reprosecution. It is irrelevant that the acquittal
> a) was not so denominated by the trial judge,
> b) may have been erroneous both procedurally and in terms of the questions of law on which it was founded, and
> c) came about with defendant's cooperation and consent." Anderson supra, 479; 295 NW2d 484.

Petitioner seeks review of the opinion below by writ of certiorari, which Respondent opposes.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION: WAS RESPONDENT TRULY ACQUITTED?

It is important to emphasize that there was an express reason for dismissing the murder charges and it was an evidentiary reason, i.e., the lack of any evidence to support the elements of malice (second-degree murder) or premeditation and deliberation (first-degree murder). Having heard virtually the whole case, if not technically all of it, the trial judge determined that there was sufficient evidence to support only the crime of manslaughter and not murder in either degree (Petitioner's Appendix E, pp. 43-45). The Judge determined that he could not submit the murder charges to the jury and said as much when he explained that he would eventually have had to direct a verdict of acquittal on first and second degree murder (Petitioner's Appendix E, pp. 44-45; 46-47).

It is true that the trial court did not hear the whole of the prosecution's case. The trial judge did, however, hear virtually

the whole case, less only two res gestae witnesses and various police witnesses. Unlike the ordinary case, in which testimony favorable to the prosecution's side comes in first and then, only after the prosecution rests does testimony favorable to the defense come in, in the case at bar evidence favoring the defense came out in the prosecution's case-in-chief. By the end of the second day of trial the trial judge determined that there was no reasonable inference that could be drawn from the evidence other than that a manslaughter, not murder, had occurred.

It is hardly important that the prosecution had one more witness left who could testify to an intent to kill (Petitioner's Appendix E, pp. 45-46). The trial judge had already heard testimony establishing an intent to kill; the one remaining res gestae witness who could testify on that point must be deemed cumulative, at best.

In short, given everything testified to by the prosecution's witnesses, the only permissible inference was that Respondent did not use reasonable force under the circumstances and, therefore, the killing was not a justifiable homicide but a manslaughter.

The Michigan Supreme Court concluded as follows:

> "We conclude that the judge's decision to accept Anderson's mid-trial plea and to dismiss the murder charge involved a resolution of factual elements of the offense charged, and was based on his belief, correct or incorrect, prematurely formed or not, that the evidence was insufficient to support a conviction of murder." People v Anderson, supra, 487; 295 NW2d 488.

Petitioner argues, as reasons why the writ should issue, that the Michigan Supreme Court was "understandably confused" by recent decisions of this Honorable Court relating to acquittals under the Double Jeopardy Clause; that lower courts in general face a "dilemma" in applying the rules of decision and that those rules are "contradictory and conflicting". Further, Petitioner addresses the merits of the opinion below and argues that the trial judge

really rested his dismissal of murder on a purely legal ground and failed to reach the ultimate question of guilt or innocence. Petitioner argues that the present record, although complex, presents a unique opportunity for this Honorable Court to bring clarity to a confused situation (Petition for Writ of Certiorari, pp. 5-6). Was the Michigan Supreme Court confused? Respondent answers it was not.

2. THE MICHIGAN SUPREME COURT DEMONSTRATED NO CONFUSION IN RECOGNIZING AND APPLYING THE CONTROLLING RULES OF DOUBLE JEOPARDY LAW.

If the unanimous Michigan Supreme Court was confused it did not say so. If anything, the opinion below, authored by Justice Charles Levin, is clear; there is a total absence of textual evidence for the claimed confusion.

The opinion below readily identifies the controlling principles upon which the Michigan Supreme Court relied. That Court referred to the fundamental rule that a judgment of acquittal is not reviewable. United States v Martin Linen Supply Co., 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977); United States v Scott, 437 US 82; 97-98 S Ct 2187; 57 L Ed 2d 65 (1978). See People v Anderson, supra, 483 note 10 and accompanying text; 295 NW2d 486. The opinion below further identifies the rule that a trial judge's characterization of his own action is not controlling on a reviewing court. United States v Scott, supra 96; United States v Jorn, 400 US 470; 91 S Ct 547; 27 L Ed 2d 543 (1971). See People v Anderson, supra, 486 and accompanying notes 24-27; 295 NW2d 487. The Michigan Supreme Court recognized that to be an acquittal a dismissal must be fact-based. United States v Scott, supra, pp. 97-98; Burks v United States, 437 US 1, 10; 98 S Ct 2141; 57 L Ed 2d 1 (1978). See People v Anderson supra, 491; 295 NW2d 490. Finally, the opinion below recognized the rule that an acquittal is an acquittal even if it results from erroneous evidentiary rulings or erroneous interpretations of governing law. United States v Scott, supra p. 98; Sanabria v United States, 437 US 54-64; 98 S Ct 2170; 57 L Ed 2d 43 (1977); Fong Foo v United States, 369 US 141, 143;

82 S Ct 671; 7 L Ed 2d 629 (1962). See People v Anderson, supra, 492-493 and accompanying notes 33-36; 295 NW2d 490-491.

It can hardly be said that the Michigan Supreme Court failed to properly identify the law it was supposed to apply. Since the controlling rules were properly identified, the only question for review is the correctness or incorrectness of the application of those rules. Ross v Moffet, 417 US 600, 616-617; 94 S Ct 2437; 41 L Ed 2d 341, 354 (1974). Respondent will show that the Michigan Supreme Court correctly held that the dismissal of murder in the case at bar was a fact-based acquittal in the true sense and that there was no fundamental misapplication of the rules. But first, one may ask whether other court's are confused or face a dilemma in applying the fact-based acquittal rule? If so, does the case at bar raise a substantial federal question?

3. THE CASE AT BAR DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION. LOWER COURTS DEMONSTRATE NO CONFUSION IN APPLYING THE FACT-BASED ACQUITTAL RULE.

The case at bar raises no substantial federal question. There is no showing, or even claim, by Petitioner that a conflict exists between the opinion below and any opinion by a federal court of appeals or highest state court of review. There is also no support shown by Petitioner for the claim that lower courts actually face a dilemma in applying the fact-based acquittal rule. The majority of this Court in United States v Scott, supra, 98 note 11, discounted the spectre of possible confusion by courts in distinguishing between those rulings which relate to the ultimate question of guilt or innocence and these which serve other purposes. Still, Petitioner hypothesizes such difficulty, fails to support the claim, and argues that it is urgent for this Court to review once again, in a unique case, an area just recently addressed.

The fact-based acquittal rule is not even three years old. When the Michigan Court of Appeals issued its opinion in this case United States v Scott, supra, had not been decided. Since Scott only a handful of applications of the rule have been passed upon by the Michigan Court of Appeals. See People v Smith, 89 Mich App 478; 280 NW2d 862 (1979) (On reh); People v Greer, 91 Mich App 18; 282 NW2d 819 (1979); People v Jakiel, 92 Mich App 754; 285 NW2d 448 (1979); People v Killarney, 95 Mich App 396; 290 NW2d 156 (1970). The present case is the first opportunity that the Michigan Supreme Court has had to reach the issue. But see People v Hampton, 407 Mich 354, 385-386; 285 NW2d 284 (1979) certiorari den. ___US___; ___S Ct ___; ___ L Ed 2d ___; 28 CrL 4006, October 8, 1980. There has been insufficient time since Scott for the lower courts to work with the fact-based acquittal rule so as to justify review by this Court. A sound empirical basis has not been shown to exist demonstrating any need for this Honorable Court to speak now to the application of the fact-based acquittal rule.

Although by no means exhaustive, a review of lower courts in select cases demonstrates the workability of the Scott rule. See: United States v Moore, 613 F2d 1029 (US DC 1979) certiorari den. ___US___; 100 S Ct 2922; ___L Ed 2d (1980)(no bar to Government appeal under Scott from bench trial dismissal - legal defense); United States v Allied Towing Corp, 602 F2d 612 (CA 4 1979)(no bar to Government appeal under Scott - jurisdictional defense); United States v McInnis, 601 F2d 1319 (CA 5 1979) certiorari den. ___US___; 100 S Ct 1649; 94 L Ed 2d 237 (1980)(no bar to Government appeal under Scott - legal ground for dismissal); United States v Gonzales et al, 617 F2d 1358 (CA 9 1980) certiorari den. sub. nom. Patel v United States ___US___; __ S Ct___; ___L Ed 2d ___ (No. 80-117; October 15, 1980) 49 LW3265, 3270; 28 CrL 4033-4034 October 15, 1980; People v Dennis Waggoner, 196 Colo 578; 595 P2d 217 (1979); Commonwealth v Wimberly, ___ Pa ___; 411 A2d 1193 (1980); State v

Rhinehart, 21 Wash App 708; 586 P2d 124 (1978) rev. on other grounds 92 Wash 2d 923; 602 P2d 1188 (1979) (five justices agreed on Scott's applicability - majority did not reach issue). Although the Scott case was misread in State ex rel Dowdy v Robinson, 257 SE2d 167 (W. Va) (1979), the subsequent decision in State ex rel Betts v Scott, 267 SE2d 173 (W. Va) (1980) corrected the error.

If the foregoing sample of cases demonstrate anything it is that the lower courts can and are working with the fact-based acquittal rule and that no confusion or dilemma is sufficiently evident to justify review by this Court at this time.

The lower courts sit for the very purpose of applying the rules of decision announced by this Honorable Court. Time and experience with the fact-based acquittal rule will afford the best test of the rule after hundreds of unique factual situations occur. Although uniformity of rule application is a desireable goal, absent any showing of actual conflicts or special difficulty with the rule, there is no need for the Court to accept review in every case that comes along. For this reason alone this Honorable Court should deny review in this case. But there is another reason. The instant case arose, sui generis, and carries no national significance.

4. THE PRESENT CASE AROSE IN AND IS TOO ROOTED TO PROCEDURAL RULES PECULIAR TO MICHIGAN AND THEREFORE LACKS NATIONAL SIGNIFICANCE.

As noted by the Michigan Supreme Court in its opinion below, the case at bar arose in the context of developing state procedural law. People v Anderson, supra, 409 Mich 481-482; 295 NW2d 485. See Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 115; 215 NW2d 693 (1972)(Genesee I); Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974). (Genesee II).

In Genesee I the Michgan Supreme Court reversed a trial judge who had reduced an information by pretrial amendment so as to charge a lesser offense and then permitted the defendant to plead

guilty to the reduced charge, over the prosecution's objections. In reversing, the Genesee I opinion reserved for a later day the question whether the trial judge could have properly reduced the information if it had determined that defendant was not guilty of the higher original charge:

> "In addition, because of the trial judge's determination that [defendant] McBride was 'actually guilty of the higher offense' we are not concerned with any question of the scope of authorized power under MCLA 767.76; MSA 28.1016 to amend informations for technical defects or because of variance with the evidence." Supra, 682-683. (Emphasis supplied).

Although the circumstances differ, the case at bar raised the issue reserved in Genesee I, supra, namely does a trial judge have the power, the judicial power, to reduce an original charge to a lesser offense and accept a guilty plea thereto when the trial judge determined that the defendant cannot be properly found guilty under the higher charge?

The trial judge in the case at bar said that he would eventually have had to direct a verdict of not guilty at the conclusion of Petitioner's proofs because he believed that, as a matter of law, only a manslaughter, not murder had been committed (Petitioner's Appendix E, pp. 45, 46-47). By so stating, the trial judge disclosed his assumption that two state procedures existed whereby he could pass on the sufficiency of the evidence. The first option, GCR 1963, 515.1, was to grant a motion for a directed verdict as to the murder charge. This option the judge believed was available to him at the close of the prosecution's case. The second option was to dismiss the murder charge under an exception to Genesee I, supra, where it appeared to him that Respondent could not be proved guilty beyond a reasonable doubt of murder. The judge believed that either option was available because the evidence at trial was insufficient as a matter of law (Petitioner's Appendix E, p. 47). The trial judge perceived that

whatever additional evidence could be shown on the question of intent to kill, that proofs would still be insufficient to establish any crime greater than manslaughter. People v Anderson, supra, 490-491; 295 NW2d 489. By equating his actions with a directed verdict of not guilty (Petitioner's Appendix E, p. 45, 46-47), the trial judge demonstrated that he was reaching the ultimate question of guilt or innocence. His equation of the two belies that he was merely revisiting a pure question of law. The judge simply chose what he perceived as one of two then available state procedures for determining Respondent not guilty of murder in any degree. He was not relating the trial testimony back to review the pretrial motion to quash, without regard to the ultimate question of guilt or innocence.

More to the point, the procedural context in which the case at bar arose has no significance outside of Michigan and it will not occur in Michigan again. By its opinion below the Michigan Supreme Court has expressed that a directed verdict at the close of the prosecution's case is the only option available to a trial judge who believes a criminal defendant is not guilty due to evidentiary insufficiency. People v Anderson, supra, 481-482; 493-494; 295 NW2d 485, 491. Since the procedural context in the present case cannot recur in Michigan there is little point in this Honorable Court addressing the issue,. Nor is there likely to be many such cases outside of Michigan. In short, there is no national significance to the ruling below. For these reasons, this Honorable Court should deny review. Moreover, on the merits, the opinion below is correctly decided.

5. THE MICHIGAN SUPREME COURT CORRECTLY RULED ON THE MERITS AND DID NOT FUNDAMENTALLY MISAPPLY THE RULES OF DECISION ANNOUNCED BY THIS COURT.

Petitioner argues that the trial judge used the trial testimony to "relate back" to this pretrial motion to quash. Thus, according to Petitioner, the trial judge never reached the ultimate issue of guilt or innocence. This argument is specious.

The Michigan Supreme Court rejected the premise of the relation back theory. People v Anderson, supra, 485-486; 295 NW2d 487. At its core Petitioner's argument gives an uncritical emphasis to the form of the trial judge's action, not its meaning. It is true that the trial judge said he was granting the pretrial motion to quash. But the purpose of such motion is to test the exercise of discretion by the examining magistrate. The standard is whether an abuse of discretion occurred based upon the four corners of the examination transcript. People v Doss, 406 Mich 90, 101; 276 NW2d 9 (1979); Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115, 121; 215 NW2d 145 (Genesee II). Amplifying testimony at trial is not considered. People v Paille #2, 383 Mich 621, 626; 178 NW2d 465 (1970); People v Charles D. Walker, 385 Mich 565, 572; 189 NW2d 234 (1971). If an abuse of discretion is found reprosecution is possible; the case does not terminate. People v Miklovich, 375 Mich 536; 134 NW2d 720 (1965); People v Panknin, 4 Mich App 19; 143 NW2d 806 (1966).

Clearly the trial judge did not contemplate further prosecution; he did not remand the case for further examination. The purpose of the judge's actions was to finally terminate the prosecution. Twice the trial judge said the testimony at examination was sufficient to hold Respondent for trial (Petitioner's Appendices C, p. 22 and E, p. 49). No abuse of magisterial discretion was found. Rather the judge merely opined that if the magistrate had heard the trial testimony, as opposed to that heard at examination, Respondent would not have been held for trial on the first degree murder. The Michigan Supreme Court properly

viewed the judge's characterization of his own action as an "afterthought" to Petitioner's objections. People v Anderson, supra, 487; 295 NW2d 488. The dismissal went to both first and second degree murder, whereas the motion to quash addressed only the original charge. The judge evaluated the evidence at trial and concluded that it was insufficient. The judge evaluated the defense of justification or excuse and concluded that Petitioner could not overcome its burden of proving the absence of justification or excuse. Therefore, he concluded that a manslaughter and not a murder had occurred. Whatever the correctness of the judge's legal interpretation, see People v Doss, supra, 98-99; and People v Van Wyck, 402 Mich 266, 269; 262 NW2d 638 (1978), he obviously did reach the ultimate question of guilt or innocence. It is not the function of preliminary examination for defenses to be evaluated. People v Weiden, 239 Mich 169; 214 NW 120 (1925); People v Medley, 339 Mich 486; 64 NW2d 708 (1954).

If Petitioner's theory stands then the label a trial judge affixes to his own actions will have talismanic significance. Serfass v United States, 420 US 337, 392; 95 S Ct 1055; 43 L Ed 2d 265 (1975). Such characterization by a trial judge would be controlling on the constitutional question, contra to United States v Scott, 96 and cases cited therien. The Michigan Supreme Court properly rejected this kind of mechanical formulae. People v Anderson, supra, 486; 295 NW2d 487. If Petitioner were correct, a trial judge could simply label any dismissal, fact-based or not, as an acquittal and bar further review.

In conclusion, several factors support the conclusion that the trial judge reached the ultimate question of guilt or innocence and acquitted Respondent of murder in any degree: the judge (a) convicted Respondent of manslaughter; (b) sentenced Respondent for manslaughter stating: "The Court heard testimony in the case and

came to its own conclusion regarding the facts of the case (Respondent's Appendix B, p. 1b); (c) evaluated the evidence at trial regarding the defense of justification or excuse and asserted the evidence was insufficient as a matter of law because the prosecution had not and could not carry its burden to overcome the defense regardless of further evidence showing an intent to kill; (d) ruled that Respondent did not limit herself to reasonable force; (e) found Respondent was well justified in her belief that there was an attempt at rape; (f) denied he was granting a mistrial, thus implying he did not contemplate reprosecution; (g) did not find an abuse of discretion by the magistrate; (h) found the examination testimony sufficient; (i) did not remand the case for further examination; (j) believed he was empowered to accept a guilty plea if he would eventually have had to direct a verdict of not guilty; and (k) acted in good faith:

> "[Y]...I am satisfied that what I have done is correct both factually, legally and from a justice standpoint ..." (Petitioner's Appendix E, p. 49).

Whether the judge was correct or not in his legal interpretations which led to his dismissal is irrelevant. United States v Scott, supra, 98. Petitioner's "real quarrel is with the judgment of acquittal". Sanabria v United States, supra, 77.

Nor did Respondent waive the protection of the Double Jeopardy Clause (Petitioner's Appendix E, p. 48). Respondent's cooperation is irrelevant. As this Honorable Court said in Sanabria, supra, 78:

> "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mistrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests [citation omitted], and would vitiate one of the fundamental rights established by the Fifth Amendment.

> The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo v United States, makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances."

For all of the above reasons, the Michigan Supreme Court did not fundamentally misapply Double Jeopardy law. The writ should not issue.

6. THE FINDING OF A FACTUAL BASIS FOR THE GUILTY PLEA TO MANSLAUGHTER AND NOT MURDER, THE ACCEPTANCE OF THE PLEA AND THE IMPOSITION OF SENTENCE THEREON COLLATERALLY ESTOP ANY RETRIAL ON MURDER.

Regardless of whether the trial judge acquitted Respondent on the first and second degree murder charges there exists an independent reason why the Double Jeopardy Clause bars retrial on any charges arising from the May 22, 1975 shooting incident. The doctrine of collateral estoppel bars retrial under the circumstances of the instant case. Ashe v Swenson, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970); People v Grey, 393 Mich 1, 222 NW2d 515 (1974).

The principle of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future prosecution. Ashe v Swenson, supra, 397 US 443.

A. THE TRIAL JUDGE'S ACCEPTANCE OF THE PLEA AND IMPOSITION OF SENTENCE IS A FINAL JUDGMENT.

Since Petitioner filed a claim of appeal in the instant case it must be deemed to admit that the trial judge's action constitutes a final judgment. A final judgment is a prerequisite for a prosecutor appeal. People v Blachura, 390 Mich 326; 212 NW2d 182 (1973). But see Jackson Prosecutor v Court of Appeals, 394 Mich 527; 232 NW2d 172 (1975) (stating only that final pretrial order

provides jurisdiction). Respondent agrees that the judge's action is a final judgment. Jeopardy attaches when a defendant who pleads guilty is sentenced. People v Alvin Johnson, 396 Mich 424, 431 note 3; 240 NW2d 729 (1976); citing People v Burt, 29 Mich App 275, 277; 185 NW2d 207 (1970). Respondent was sentenced on her plea of guilty to manslaughter on November 24, 1975.

B. THE QUESTION OF FACT WHETHER DEFENDANT USED REASONABLE FORCE WAS A QUESTION OF ULTIMATE FACT IN THIS MURDER A PROSECUTION AND THE TRIAL JUDGE FOUND AS A MATTER OF FACT THAT RESPONDENT WENT BEYOND THE USE OF REASONABLE FORCE.

There is little doubt that regardless of the trial judge's treatment of the murder charges he found that Defendant did not use reasonable force to render the homicide justifiable but that she went beyond reasonable force and committed manslaughter (Petitioner's Appendix E, p. 44).

In accepting a plea of guilty a trial judge must make a finding that a factual basis exists for the plea; i.e., that the defendant is in fact guilty of the offense to which he or she is pleading, GCR 1963, 785.7(3)(a) as amended November 7, 1975, previously, GCR 1963, 785.7(3)(c) and 785.7(3)(d).

When a trial judge accepts a plea of guilty in the middle of trial he may rely upon the testimony adduced at trial in the course of making his finding of fact compliant with the factual basis requirements of the court rules. People v Armstrong 390 Mich 693, 698-699; 213 NW2d 190 (1973).

A trial judge always has the power to accept a plea of guilty. GCR 1963, 785.7. People v Matulonis, 60 Mich App 143, 148; 230 NW2d 147 (1975); Genesee II, supra, 119.

The question of the validity of the plea of guilty is distinct from the question whether the plea bars Petitioner from further trial of the murder charges. It is the latter course that

the Petitioner seeks and it is only insofar as the plea of guilty prohibits further trial on murder that the Petitioner objects to it. (This is so because, presumably, the Petitioner would not object to the fact that Respondent has pleaded guilty to manslaughter so long as she still must stand trial on the first degree murder charge.) See People v Auer, 393 Mich 667, 671-672, 679-681; 227 NW2d 528 (1974); People v Ringstaff, 53 Mich App 223, 225, 226; 218 NW2d 859 (1979), rev'd on other grounds, 393 Mich 263; 224 NW2d 287 (1974), aff'd on reh. 64 Mich App 639, 644; 236 NW2d 728 (1975).

The information charged Respondent with first and second degree murder and manslaughter and the trial judge found that there was a factual basis showing manslaughter, based upon his hearing of the trial testimony, and accepted a plea of manslaughter. Thereafter he sentenced her on that offense.

Any retrial would involve the same parties and the same facts that led to the trial judge's determination that reasonable force was not used and so a manslaughter was committed. Therefore, any retrial of Respondent would be in direct contradiction of the collateral estoppel doctrine. Ashe v Swenson, supra.

Although the Michigan Supreme Court did not reach this point the result below would be the same if it had so ruled. The Court may therefore consider the argument. United States v New York Telephone Co., 434 US 159, 155 note 8; 98 S Ct 364; 54 L Ed 2d 376 (1977). Citing Langes v Green, 282 US 531, 538-539; 51 S Ct 243; 75 L Ed 520 (1931); Dandridge v Williams, 397 US 471, 475 note G; 90 S Ct 1153; 25 L Ed 2d 491 (1970).

This Honorable Court need not review the case at bar for the reason that the collateral estoppel ground would be an independent alternative ground supporting the result below. The writ should be denied.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: December 3, 1980

RESPONDENT'S APPENDIX

APPENDIX A

Trial Record, Detroit Recorder's Court

Jurors previously impanelled and sworn return to Court to hear further testimony in said cause:

Oct 7, 1975: Opening statements by both parties.
People's witnesses: Carrie Burton, sworn by Louise B. Darmis, Court Clerk; Satish Shah, sworn by Louise B. Darmis, Court Clerk; Willie Young, sworn by Louise B. Darmis, Court Clerk.

Oct 8, 1975: Willie Young, heretofore sworn by Louise B. Darmis, Court Clerk; Viola Wheeler, sworn by the Court;
Barbara Golden, sworn by the Court.

Oct 9, 1975: During the process of the jury trial, defendant pleads guilty. Jury panel is excused.

Hon. Thomas L. Poindexter
Recorder's Court Judge

APPENDIX B

Sentence Transcript

SENTENCING TRANSCRIPT

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs Elva Jean Anderson)
(Docket No. 75-3831)

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, on Monday, November 24th, 1975.

APPEARANCES: Brian MacKenzie, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Anderson.

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(2)

Detroit, Michigan. Monday, November 24th, 1975.

THE COURT: This is Case No. 75-03831, People vs. Elva Jean Anderson.

MR. ROTH: We are ready to proceed to sentence, your Honor.

THE COURT: Defendant Anderson, you were charged with murder in the first degree and, on October 9th, 2975(sic), you pled -- this Court dismissed -- discontinued the trial of the case, which was in progress at that time, and accepted a guilty plea to manslaughter in the case which, under Section 750.321 of the Compiled Laws, is a felony and carries a maximum punishment of 15 years imprisonment.

Is there anything you wish to say before sentence is pronounced?

DEFENDANT ANDERSON: I don't think so.

MR. ROTH: I have read the report, but I don't understand one paragraph -- the last paragraph -- I tried to get an interpretation from Mr. Mader but he wasn't prepared to do so, so I am still

(3)

at a loss with that last report -- that last paragraph.

I think your Honor is fully familiar with the facts and circumstances in this case --

THE COURT: Yes, I have heard the testimony --

MR. ROTH: -- so I don't have to --

THE COURT: The Court is cognizant of the fact that this may not be a final disposition of the case --

MR. ROTH: That's true.

THE COURT: -- in view of the fact that I understand the Prosecutor intends to attempt to review this Court's actions in dismissing the murder charge in the case. I understand that a transcript of the trial proceedings has been ordered.

This Court gave a great deal of attention to this case and, in the first instance, the Court was somewhat misled by statements that were made by police officers and prosecutors regarding the nature of the case.

This Court heard the testimony in the case and came to it's own conclusion regarding the

(4)

facts of the case.

Tell me this, Ms. Anderson, you said you have an eight year old daughter. What are your connections with the daughter at this time?

DEFENDANT ANDERSON: My sister have her.

THE COURT: How is she supported?

DEFENDANT ANDERSON: She's on Aid right now.

THE COURT: Do you support her, your daughter?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: What would happen if you were required to serve some time -- what would that do to your job prospects?

DEFENDANT ANDERSON: Well, I might not have the possibility of getting my job back.

THE COURT: You have been locked up since the beginning of this case?

MR. ROTH: That's right, until your Honor released her on October 9th.

THE COURT: That was how many days?

MR. ROTH: On May 22nd, I noticed

(5)

on the information, your Honor, up until October 9th.

COURT CLERK: 135 days.

THE COURT: Well, there is a recommendation that you should be placed on probation and to serve some time in jail on the sentence -- I don't now (sic) what the purpose of that would be, since you have already had to serve 135 days in jail.

The Court will place you on probation for a period of three years.

You will be required to pay court costs in the amount of $350.00 at the rate of 20 dollars a month, beginning -- when you find employment.

You will be required to begin supporting your daughter by contributing at least 20 dollars a week to her support as soon as you are employed.

Finally, I am not in a position to tell anybody how to live their life, but in view of the fact that you did kill a person I am going to require that for at least one year you shall attend a church of your choice.

Defendant, the Clerk will hand

(6)

you a copy of your appeal rights.

If you desire to appeal you must appeal within 60 days from this date, and I understand the Prosecutor's Office also is considering an appeal in the case.

(Hearing of the Foregoing matter was concluded.)

# # # #

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 80-747

STATE OF MICHIGAN,

Petitioner,

-vs-

ELVA JEAN ANDERSON,

Respondent.

STATEMENT AS TO MAILING

I, JAMES R. NEUHARD, Defender, of the State Appellate Defender Office hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited at the United States Post Office, General Post Office, 1401 Fort Street, Detroit, MI, on Wednesday, December 3, 1980, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court, and that first class postage was prepared.

The papers so mailed were:

a) Motion to Proceed in Forma Pauperis
b) Affidavit in Support of Motion to Proceed in Forma Pauperis
c) Brief in Opposition to Petition for Writ of Certiorari
d) Appendix to c), supra
e) Proof of Service

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: _____
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226

Dated: December 3, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

Dora Enloe being first duly sworn deposes and says that on December 3, 1980 she mailed the following documents:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing
Proof of Service

to: WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Counsel of Record
Principal Attorney, Appeals

BY: ANNE B. WETHERHOLT
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226

Further, deponent says not.

Dora Enloe

Subscribed and sworn to before me
this 3rd day of December, 1980.

VIRGINIA M. MELOSKY, Notary Public
Wayne County, Michigan
My commission expires: 2/28/83